88-1154

Supreme Court, U.S.
FILED
JAN 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RONALD S. MONROE,

Petitioner,

v.

HILTON BUTLER,
WARDEN, LOUISIANA STATE PENITENTIARY,
ANGOLA, LOUISIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS, LOUISIANA

ALLAN BLUMSTEIN
(Counsel of Record)
DOUGLAS G. MORRIS
JONATHAN J. FREEDMAN
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

JOHN DIGIULIO
331 St. Ferdinand
Baton Rouge, Louisiana 70802
(504) 383-0078

QUESTIONS PRESENTED

In this proceeding for post-conviction relief in a capital case, petitioner asserts five claims of violations of his Eighth Amendment rights. His first claim is based on the refusal of the state courts to provide petitioner with post-conviction relief despite the presence in the record of substantial, newly discovered evidence that petitioner is innocent of the crime for which he was convicted and sentenced to death. Four additional claims are based on new law decided by this Court after the filing of petitioner's previous petition for a writ of habeas corpus in late 1983.

The questions presented are:

1. Was petitioner convicted and sentenced to death in violation of the Eighth Amendment since substantial newly discovered evidence creates a reasonable doubt as to his guilt and renders the original evidence, upon which the conviction and death sentence were based, incomplete and hence unreliable?

2. Was petitioner sentenced to death in violation of the Eighth Amendment since the new evidence below demonstrated that petitioner is mentally retarded, functioning intellectually and emotionally as a ten to twelve year-old child? (This Court has granted a writ of certiorari in *Penry* v. *Lynaugh*, 108 S. Ct. 2896 (1988), to determine whether the execution of a mentally retarded individual violates the Eighth Amendment.)

3. Was petitioner sentenced to death in violation of the Eighth Amendment when the prosecution relied on irrelevant and inflammatory arguments concerning the impact of the victim's death on her family, contrary to the principles recently articulated by this Court in *Booth* v. *Maryland*, 107 S. Ct. 2529 (1987)?

4. Was petitioner sentenced to death in violation of the Eighth Amendment when the trial court improperly permitted the prosecution to encourage jurors to downplay their awesome responsibility in making the sentencing determination, contrary to the principles recently articulated by this Court in *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985)?

5. Was petitioner sentenced to death in violation of the Eighth Amendment when there was a substantial risk that some individual jurors voted to impose the death penalty in the mistaken belief that the law required jurors to agree unanimously on the existence of a mitigating circumstance, contrary to the principles recently articulated by this Court in *Mills* v. *Maryland*, 108 S. Ct. 1860 (1988)?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

The Crime and the Conviction 3

Evidence of Monroe's Innocence 4

Evidence of Monroe's Mental Retardation 6

The Facts Underlying the Booth, Caldwell *and* Mills *Claims* 6

The "Successor" Proceeding for Post-Conviction Relief 7

REASONS FOR GRANTING THE WRIT 9

I. THIS COURT SHOULD GRANT THE WRIT BECAUSE THE EXECUTION OF A PERSON WHEN THERE IS SUBSTANTIAL, NEWLY DISCOVERED EVIDENCE WHICH CREATES REASONABLE DOUBT AS TO GUILT WOULD VIOLATE THE EIGHTH AMENDMENT 9

A. Several Pieces of New Evidence Tend To Show Monroe's Innocence 9

1. Stinson's Confession to McWilliams 10

2. Stinson's Pattern of Stabbing Estranged Wives 11

3. Stinson's Presence in the Area the Evening of the Collins Murder 12

4. Doubts About the Identification of Monroe as the Perpetrator 12

5. Confirmation that Monroe's Hand Was Cut in a Barroom Fight on the Evening of the Collins Murder 14

B. Execution of a Person Despite Reasonable Doubt as to Guilt Would Violate the Eighth Amendment 16

II. THIS COURT SHOULD GRANT THE WRIT BECAUSE MONROE IS MENTALLY RETARDED AND THEREFORE HIS EXECUTION WOULD BE CRUEL AND UNUSUAL PUNISHMENT 18

A. Monroe is Mentally Retarded 18

B. The Execution of a Mentally Retarded Person Violates the Eighth Amendment . 20

1. Contemporary Standards Define Cruel and Unusual Punishment 20

2. The Execution of the Mentally Retarded Presents a Parallel Issue to the Execution of Juveniles 21

a. Diminished Culpability 22

b. Inapplicability of Retribution or Deterrence 22

III. THIS COURT SHOULD GRANT THE WRIT BECAUSE THE ADMISSION OF INFORMATION OF THE CRIME'S IMPACT ON THE VICTIM'S FAMILY VIOLATED THE MANDATE OF *BOOTH* V. *MARYLAND* 23

IV. THIS COURT SHOULD GRANT THE WRIT BECAUSE THE PROSECUTION ARGUMENT THAT THE JURY LACKED FULL RESPONSIBILITY FOR ITS SENTENCING VERDICT VIOLATED THE MANDATE OF *CALDWELL* V. *MISSISSIPPI* 26

V. THIS COURT SHOULD GRANT THE WRIT BECAUSE THE SUBSTANTIAL PROBABILITY THAT SOME JURORS VOTED TO IMPOSE THE DEATH PENALTY ON THE REASONABLE, BUT MISTAKEN, BELIEF THAT ALL TWELVE JURORS HAD TO AGREE ON THE EXISTENCE OF A MITIGATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT VIOLATED THE MANDATE OF *MILLS* V. *MARYLAND* 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases	Page(s)
Beck v. *Alabama*, 447 U.S. 625 (1980)	16
Booth v. *Maryland*, 107 S. Ct. 2529 (1987)	i, 16, 24
Brady v. *Maryland*, 373 U.S. 83 (1963)	3
Caldwell v. *Mississippi*, 472 U.S. 320 (1985)	ii, 26, 27
California v. *Ramos*, 463 U.S. 992 (1983)	17
Eddings v. *Oklahoma*, 455 U.S. 104 (1982)	16, 17
Gardner v. *Florida*, 430 U.S. 349 (1977)	16, 17
Green v. *Georgia*, 442 U.S. 95 (1979)	16
Gregg v. *Georgia*, 428 U.S. 153 (1976)	16, 22
Lindsey v. *King*, 769 F.2d 1034 (5th Cir. 1985)	18
Mills v. *Maryland*, 108 S. Ct. 1860 (1988)	ii, 28, 29
Monroe v. *Butler*, 109 S. Ct. 7 (1988)	8
Penry v. *Lynaugh*, 108 S. Ct. 2896 (1988)	i, 19
Presnell v. *Georgia*, 439 U.S. 14 (1978)	16
Satterwhite v. *Texas*, 108 S. Ct. 1782 (1988)	16
South Carolina v. *Gathers*, 369 S.E.2d 140 (S.C.), *cert. granted*, 109 S. Ct. 218 (1988)	23
State v. *Lee*, 524 So. 2d 1176 (La. 1988)	17
State v. *Monroe*, 366 So. 2d 1345 (La. 1978)	3
State v. *Monroe*, 397 So. 2d 1258 (La. 1981), *cert. denied*, 463 U.S. 1229 (1983)	3, 25

Sumner v. *Shuman*, 107 S. Ct. 2716 (1987) 17

Thompson v. *Oklahoma*, 108 S. Ct. 2687 (1988) 21, 22, 23

Witherspoon v. *Illinois*, 391 U.S. 510 (1968) 16

Woodson v. *North Carolina*, 428 U.S. 280 (1976) 16, 17

Zant v. *Stephens*, 462 U.S. 862 (1983) 16

Constitutional Provisions

U.S. Constitution, amend. VIII ..... *passim*

U.S. Constitution, amend. XIV, § 1 3

Statutes

28 U.S.C. § 1257(3) 2

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) 21

Ga. Code Ann. § 27-1503(j) (1988) 21

Other

AAMD, *Manual on Terminology and Classification in Mental Retardation* (H. Grossman ed. 1983) 19, 20

AAMR, Resolution (1988) 21

ABA Standards for Criminal Justice § 9.3 (1980) 21

Analysis Group Inc., Capital Punishment in Connecticut (May 1986) 20

Cambridge Research Survey, Analysis of Attitudes Toward Capital Punishment in Florida (June 1985) 20

Center for Public and Urban Research, George State University, Georgia Residents' Attitudes Toward the Death Penalty, the Disposition of Juvenile Offenders, and Related Issues (Dec. 1986) 20

Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414 (1985) 23

Georgia Bars the Execution of Retarded Killers, N.Y. Times, Apr. 12, 1988, at A26, col. 4 21

D. Johnson & A. Booth, Bureau of Sociological Research, University of Nebraska, Nebraska Annual Social Indicator Survey (Jan. 1988) 20

No. 88–

In the

Supreme Court of the United States

October Term, 1988

RONALD S. MONROE,

Petitioner,

v.

HILTON BUTLER,

Warden, Louisiana State Penitentiary,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS, LOUISIANA

In this proceeding for post-conviction relief, petitioner Ronald S. Monroe respectfully prays that a writ of certiorari issue to review an order of the Criminal District Court for the Parish of Orleans which denied petitioner's federal constitutional challenges to the sentence of death imposed upon him by the State of Louisiana.

Petitioner is under sentence of death in the Louisiana State Penitentiary at Angola, Louisiana pursuant to a judgment of conviction of murder in the first degree. By order dated November 29, 1988, the Louisiana Supreme Court stayed his execution pending the timely filing and disposition of this petition.

OPINIONS BELOW

The prior opinions or orders in this proceeding are annexed as appendices to the petition, as follows: [1]

A. Unreported Order of August 22, 1988 of the Criminal District Court for the Parish of Orleans, Louisiana denying petitioner's Application for Post-Conviction Relief.

B. Unreported Order of the Louisiana Supreme Court of October 14, 1988 denying petitioner's Application for Emergency Supervisory Writ and Opinion of Justice Lemmon Concurring in the Denial.

C. Unreported Order of the Louisiana Supreme Court of November 23, 1988 denying petitioner's Application for Emergency Supervisory Writs, and All Other Needful Writs, Orders and Processes.

JURISDICTION

The order of the Criminal District Court for the Parish of Orleans, denying petitioner's Application for Post-Conviction Relief, was entered on August 22, 1988; the decision of the Louisiana Supreme Court denying petitioner's Application for Emergency Supervisory Writ to review the Criminal District Court's order was entered on October 14, 1988; and the decision of the Louisiana Supreme Court denying petitioner's Application for Emergency Supervisory Writs and All Other Needful Writs, Orders and Processes to review the Criminal District Court's order was entered on November 23, 1988. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(3). An order extending the time for filing this petition for a writ of certiorari to and including January 12, 1989 was signed by the Honorable Byron R. White on December 5, 1988.

---

[1] The prior opinions in the previous habeas corpus proceeding were annexed to a previous petition for a writ of certiorari filed in this Court on August 10, 1988 and denied by this Court on August 23, 1988. For the convenience of the Court, petitioner has annexed to this petition two of those prior opinions: as Appendix D the Unreported Decision of the United States District Court for the Eastern District of Louisiana of February 28, 1984 and as Appendix E the Findings and Conclusions of United States Magistrate Marcel Livaudais of February 2, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment VIII to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

2. Amendment XIV, Section 1 to the United States Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

We describe here the prior proceedings directly relevant to the present petition. [2/]

The Crime and the Conviction

In the early morning of September 10, 1977, an intruder murdered Lenora Collins in her New Orleans home by stabbing her repeatedly in the chest and neck.

The only evidence linking Monroe to the crime was the identification by the victim's two preteenaged children, Joseph and Theodise (App. D at 4). There was no physical evidence, such as fingerprints, footprints, a murder weapon or blood samples implicating Monroe (*id.*). He has consistently maintained his innocence.

On January 23, 1980, Monroe was convicted of the first degree murder of Lenora Collins and sentenced to death. [3/] Monroe's conviction was affirmed on direct appeal. *State* v. *Monroe*, 397 So. 2d 1258 (La. 1981), *cert. denied*, 463 U.S. 1229 (1983).

[2/] For the most recent detailed description of all earlier proceedings, including a description of the proceedings relating to the finding that Monroe's rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963), were violated and relating to the appropriate remedy for that violation, see petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit of August 10, 1988 at 3-13.

[3/] The Louisiana Supreme Court had reversed a previous conviction on appeal. *State* v. *Monroe*, 366 So. 2d 1345 (La. 1978).

Evidence of Monroe's Innocence

Soon after Monroe's conviction, the State's case against Monroe began to unravel. From the summer of 1980 through the autumn of 1988, a series of new pieces of evidence have appeared that tend to show that Collins was murdered by her husband, George Stinson, not by Monroe. The new pieces of evidence show that Stinson, at least once and probably twice, confessed to murdering Collins, that he had the motivation and the capability to commit the Collins murder, and that he probably intimidated the Collins children into pinning the blame for his violent deed on Monroe.

The new pieces of evidence are as follows:

On July 3, 1980 — six months after Monroe's conviction — Stinson brutally murdered his common-law wife, Erma Jean Lofton, in Pontiac, Michigan, by stabbing her repeatedly in the chest and neck (App. E at 5). The Lofton murder bore striking similarities to the Collins murder.

In mid-September 1980, Francis Lee McWilliams, Stinson's cellmate in the county jail, told Michigan authorities — including Michigan Police Detective Joseph Gallardo — that Stinson had confessed to stabbing Lofton to death, and then stated that his first wife, Lenora Collins, had died the same way Lofton had died (Ex. 2, ¶ 8 and Ex. A). [4/] Since Michigan authorities understood Stinson's statement

---

[4/] References are to exhibits in (i) the Exhibit Volume accompanying petitioner's Application for Post-Conviction Relief made in the Criminal District Court for the Parish of Orleans on August 22, 1988, (ii) the Exhibit Volume accompanying petitioner's Application for Emergency Supervisory Writs and All Other Needful Writs, Orders and Processes made in the Louisiana Supreme Court on November 2, 1988, and (iii) the Supplementary Exhibit Volume submitted to the Louisana Supreme Court on November 8, 1988, courtesy copies of which have been provided to this Court. It should be noted that the Exhibit Volume and Supplementary Exhibit Volume to the Louisiana Supreme Court number exhibits in conformity with the Exhibit Volume to the Criminal District Court and contain the same as well as additional exhibits as that earlier Exhibit Volume.

to his cellmate to be a possible confession to the Collins murder, Detective Gallardo twice notified the New Orleans Police Department of the evidence he had uncovered (App. E at 5–6). [5/]

Stinson made a confession to the Collins murder that is even more definitive than the one McWilliams reported to the police. McWilliams' contemporaneous notes of his conversation with Stinson — which McWilliams never provided to the police — indicate that Stinson answered "Ya" and positively nodded his head in response after McWilliams asked whether Stinson had "knocked off" his first wife in New Orleans too (Ex. 13, ¶¶ 4–5 and Exs. A and D).

Not only did Stinson make both a probable and an outright confession to the Collins murder and not only did the Collins murder closely resemble the Lofton murder, but new evidence shows that Stinson perpetrated yet another attack against another wife. In a statement signed this summer by Stinson's first wife, Marie Lendo Lee, she recites that in 1959, in another jealous rage, Stinson wielded a knife against her, leaving her for dead (Ex. 8).

While Stinson's own statements and his own pattern of behavior implicate him in the Collins murder, Stinson has never come forward with an alibi. On the other hand, trial testimony that Stinson was looking for Collins in the early evening before the crime (App. D at 5) has now been confirmed by the affidavit of a neighbor, Sterling Pye (Ex. 14).

New evidence also casts grave doubt on the credibility of the two Collins children, whose eyewitness identification led to Monroe's conviction.

The possibility that Stinson intimidated the two Collins children is likely since Stinson sought to intimidate young witnesses against him in Michigan (Ex. 2, ¶ 7; App. E at 5–6).

[5/] The State's failure to disclose to either Monroe or his counsel the information conveyed by Gallardo (App. E at 7) violated Monroe's *Brady* rights, for, as the federal district court later found, the State unlawfully suppressed evidence creating a reasonabledoubt as to Monroe's guilt (App. D). Post-conviction proceedings from December 1983 through August 1988 focused primarily on the State's *Brady* violation and the appropriate remedy for that violation.

Furthermore, the two Collins children gave the police inconsistent descriptions of Monroe's purported clothing at the time of the crime. Such an inconsistency would be exactly what one would expect if the children were intimidated into falsely identifying Monroe; it would be easy enough to say Monroe did it, but harder to coordinate stories on what he was wearing.

Moreover, a childhood friend of Theodise Collins has recently reported that Stinson had sexually abused and intimidated Theodise for years before Lenora Collins' murder (Ex. 10). This new evidence supports the possibility that Stinson threatened Theodise into identifying another person as the perpetrator of a murder that Stinson himself had committed.

Finally, several people have now come forward who saw Monroe at Ollie's Bar the evening of the Collins murder and two of whom saw him get bloodied in a fight there (Exs. 11, 12, 16, 22). This new evidence confirms Monroe's account of how he received the cut that was on his hand when he was arrested.

In short, a series of independent pieces of evidence point to Monroe's innocence. The circumstances surrounding the Collins murder have all the earmarks of a crime committed by Stinson.

Evidence of Monroe's Mental Retardation

Evidence has also been uncovered of Monroe's mental retardation. A recent psychological assessment shows that Monroe's full scale IQ is only 77 (Ex. 1, Ex. A). A psychologist who has reviewed both that assessment and Monroe's past history has concluded that Monroe is borderline retarded (*id.*, ¶ 4). Monroe suffers an extreme intellectual handicap that has been worsened by a series of psychosocial factors (*id.*, ¶ 5–6). Thus, Monroe is severely limited both in his understanding of the outside world and his ability to adapt his behavior to its requirements (*id.*, ¶ 7).

The Facts Underlying the Booth, Caldwell *and* Mills *Claims*

Because of decisions rendered by this Court since late 1983 (when Monroe filed his first habeas petition), errors at Monroe's trial

have taken on new constitutional significance. Thus, at Monroe's sentencing hearing, the prosecution relied heavily upon the impact of the victim's death on her family (Tr. [6]/ 77–78, 125–26, 134, 144, 209–10, 244–45, 249 — the "*Booth*" claim, *see* Claim III below); the prosecution argued to the jury that its responsibility was lessened because the Louisiana Supreme Court would review any death sentence (Tr. 253–54, 258 — the "*Caldwell*" claim; *see* Claim IV below); and the jurors received a verdict form and instructions from the trial judge which suggested that all twelve jurors had to agree that a mitigating circumstance existed beyond a reasonable doubt in order to forego imposing the death penalty (Tr. 258–62 — the "*Mills*" claim; *see* Claim V below).

The "Successor" Proceeding for Post-Conviction Relief

This past summer, Monroe was scheduled to be executed in the early morning of Thursday, August 25, 1988. Three days before that date — on Monday, August 22 — Monroe filed with the Criminal District Court for the Parish of Orleans an Application for Post-Conviction Relief, asserting the five federal constitutional claims referred to above. Without opinion, the Criminal District Court denied Monroe's Application and his Motion for Stay of Execution on the morning they were filed (App. A).

On the same day — Monday, August 22 — the Louisiana Pardon Board held a hearing on Monroe's application for clemency. After the hearing, which lasted several hours and which included extensive examination of both Theodise Collins and Ronald Monroe, the Pardon Board unanimously recommended that the Governor commute Monroe's death sentence. We understand that the Pardon Board based its recommendation on its grave doubts as to Monroe's guilt.

Still on the same day — Monday, August 22 — Monroe applied to the Louisiana Supreme Court to stay the execution and to issue an emergency supervisory writ to review the Criminal District Court's

---

[6]/ "Tr." refers to the transcript of Monroe's trial, conducted on January 22–23, 1980.

order. The next day — Tuesday, August 23 — the Louisiana Supreme Court stayed the execution pending further order. [7]/

On October 14, 1988, the Louisiana Supreme Court, by a vote of four to three, vacated its stay order and denied petitioner's Application for Emergency Supervisory Writ (App. B). Although there was neither a written majority opinion nor a written dissent, a concurrence indicated that the court had focused on the issue of guilt or innocence (*id.*). Evidently, three of the justices harbored serious doubts as to Monroe's guilt.

In the two months after August 23, Monroe uncovered further evidence bearing on his claim that his conviction and death sentence for a crime he did not commit violates his Eighth Amendment rights. In order to give the Louisiana Supreme Court the chance to evaluate this claim in light of all the new evidence, Monroe returned to that court with an Application for Emergency Supervisory Writs, and All Other Needful Writs, Orders and Processes, which was filed on November 2. On November 23, the Louisiana Supreme Court denied that Application. On November 29, the Louisiana Supreme Court stayed Monroe's execution pending the timely filing and disposition by this Court of Monroe's petition for a writ of certiorari.

Monroe now seeks review by this Court of the serious claims of constitutional error raised below.

---

[7]/ Later that same day, this Court denied Monroe's petition for a writ of certiorari which had grown out of Monroe's challenges to the remedy ordered for the violation of his *Brady* rights. *Monroe* v. *Butler*, 109 S. Ct. 7 (1988) (Marshall, J., and Brennan, J., dissenting).

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD GRANT THE WRIT BECAUSE THE EXECUTION OF A PERSON WHEN THERE IS SUBSTANTIAL, NEWLY DISCOVERED EVIDENCE WHICH CREATES REASONABLE DOUBT AS TO GUILT WOULD VIOLATE THE EIGHTH AMENDMENT

This case continues to be haunted by the prospect that an innocent man — petitioner Ronald Monroe — has been convicted and may be executed for a crime he did not commit. Evidence that Monroe may be innocent has been steadily accumulating since his trial, with new information appearing as recently as late October 1988.

In these circumstances, the Eighth Amendment, we submit, requires the imposition of a federal constitutional standard to determine whether the substantial, newly discovered evidence requires that Monroe's conviction and sentence of death be set aside and a new trial ordered.

A. Several Pieces of New Evidence Tend to Show Monroe's Innocence

In the context of Monroe's *Brady* claim, a federal magistrate found and a federal district court held that Monroe's *Brady* rights were violated because evidence suppressed by the State "creates a reasonable doubt as to Monroe's guilt that did not previously exist." (App. D at 4.) As is now well known, the suppressed evidence was Stinson's confession to his cellmate McWilliams that he had stabbed to death his common-law wife Lofton on July 3, 1980 in Pontiac, Michigan, and his follow-up statement that his earlier wife Collins had died the same way as Lofton.

Other pieces of evidence — which the federal courts never considered because they were never suppressed or only came to light as recently as this year — also indicate Monroe's innocence. Those pieces of evidence are as follows:

1. Stinson's Confession to McWilliams

McWilliams made detailed contemporaneous notes of his conversations with Stinson, which McWilliams never mentioned to the police, but which Monroe's present counsel obtained upon interviewing McWilliams. These notes include the following (Ex. 13, ¶¶ 4–5 and Exs. A and D):

> "What happened to your wife in New Orleans?"
> "The same thing that happened to this one."
>
> "You mean you knocked her off too?"
> "Ya," he said, with a positive nod of his head.
>
> "You know behind this case here; they may start investigating you on that New Orleans case."
> "They already got some guy for that. I was cleared."

In an Affidavit executed in early October 1988, McWilliams has reconfirmed that the information in these notes regarding Stinson's confession to the Collins murder is true and accurate (Ex. 13, ¶¶ 4, 5, 11).

Indeed, there is every reason to believe that McWilliams has given entirely truthful testimony and little reason to believe that he has not.

Whenever independent verification has been possible, McWilliams' testimony has proven correct. After providing information to Michigan authorities, McWilliams passed a lie detector test (Ex. 2, ¶ 9 and Ex. B).The information provided by McWilliams about the Michigan murder was borne out by the facts established at Stinson's subsequent trial (Ex. 20 at 10–11). During the State's examination at the federal evidentiary hearing in January 1984, Stinson himself admitted that he had made the statement attributed to him by McWilliams that his earlier wife died the same way as Lofton died (*id.* at 55).

In light of the repeated independent verification of McWilliams' account, his credibility is not undermined by Stinson's self-serving statement at the federal evidentiary hearing that he did not confess to the Collins murder. The federal magistrate — who is the only judge, state or federal, to have heard Stinson's live testimony — found that "Stinson's denial that he confessed the New Orleans murder to his cellmate in Michigan does not, of itself, render the evidence

unfavorable." (App. E at 7.) Recognizing Stinson's motivation to distort the truth, the magistrate stated: "[A] confession at this time under these circumstances might adversely effect [sic] whatever Michigan release from custody rights he enjoys." (*Id.*)

2. Stinson's Pattern of Stabbing Estranged Wives

Stinson's link to the Collins murder results not only from Stinson's confessions to McWilliams, but also from the remarkable similarities among the Lofton and Collins murders (*see* App. E at 7) and Stinson's stabbing of his first wife, Marie Lendo Lee.

In a Statement of Ms. Lee obtained only six months ago, she retells how, in 1959, Stinson flew into a jealous rage, stabbed her repeatedly in the arms and face and left her for dead. Her own account is as follows (Ex. 8, ¶ 5.):

> After being exposed to George's jealous outbursts and learning about his criminal record, I told him one day at my mother's house that I wanted nothing more to do with him and was going to divorce him. George did not want to hear that talk. He became very angry and hysterical, pulled out a pocket knife, and started screaming: "I'm going to kill you and kill myself!" He ran towards me and started stabbing me in the face and arm. My mother, who was in the house at the time and saw all of this, screamed. I was hurt badly. The knife opened up big gashes in my face and arm. There was blood all around. I was close to passing out from the wounds and fell down. George ran out of the house and left me for dead. In fact, I later heard from his sister Elizabeth that he went directly from my mother's house, where he had stabbed me, to Elizabeth's house in Scotlandville and told her: "I just killed Marie. . . . I've got to get away!"

Ms. Lee's medical records from the time describe her "having been stabbed in the face which penetrated through the nose and into the floor of the mouth." (Ex. 9.)

The similarities among the Lee, Lofton, and Collins stabbings are striking. All three women lived as wives of Stinson, and all three decided, shortly before their stabbings, to leave him — Lee told

him that she wanted nothing more to do with him and was going to divorce him; Lofton planned on leaving Stinson the day of her death; and Collins stopped living with Stinson only a few months before her murder. Only Lee has lived to tell of Stinson's uncontrolled jealousy that led up to the brutal stabbing (Ex. 8, ¶ 3).

3. Stinson's Presence in the Area the Evening of the Collins Murder

In its 1984 Memorandum Opinion, the federal district court recognized that the plausibility of Stinson murdering Collins was heightened because Monroe's mother observed him looking for Collins only hours before the crime (App. D at 4). The testimony of Monroe's mother is now corroborated by an Affidavit of Sterling Pye sworn to on October 10, 1986. On the evening of the crime, Pye, a friend of the Monroes, saw Stinson drive up in his red Ford truck and talk with Theodise (Ex. 14). [8/]

The State has never countered the evidence of Stinson's presence in the area the evening of the crime by even so much as suggesting that Stinson has an alibi of any kind for that evening.

4. Doubts About the Identification of Monroe as the Perpetrator

The only evidence that the State has ever had implicating Monroe in the Collins murder was the identification by Collins' two preteenaged children (App. D at 4). But as early as the 1984 federal evidentiary hearing, doubt was cast on the accuracy of their testimony by new evidence showing Stinson's penchant for seeking to intimidate witnesses against him (Ex. 2, ¶ 7; App. D at 5–6). Now further troubling evidence draws their credibility into doubt.

The credibility of the two children is impeached by the inconsistent descriptions — in statements obtained from them by the New Orleans Police Department soon after the crime — as to what

---

[8/] A letter from Stinson's former employer, the Hardin Bag Company, provides more general corroboration insofar as it indicates that Stinson quit his job on June 18, 1979 (Ex. 15) and thus was still employed in New Orleans at the time of the Collins murder. Both the Pye Affidavit and the Hardin Bag Company letter were submitted for the first time to the Louisiana Supreme Court with petitioner's Application for Emergency Supervisory Writs and All Other Needful Writs, Orders and Processes.

Monroe purportedly had been wearing at the time. While Theodise thought Monroe was wearing blue jeans and a white T-shirt, Joseph said that he was wearing gray pants but no shirt. [9] Such an inconsistency would be exactly what one would expect from children intimidated into a false identification; they could easily coordinate stories as to the perpetrator's identity, but not his clothing.

A Statement of Theodise's childhood friend Barbara Davis dated September 16, 1988 (Ex. 10) also casts doubt on the reliability of Theodise's testimony. Davis reports that during the two years preceding the Collins murder, Stinson was sexually abusing Theodise and threatening her with physical harm if she did not keep quiet about his sexual abuse (*id.* at 2). Ms. Davis, who lived next door to the Collins family, states the following (*id.* at 1–4):

> When [Theodise] was 11 years old + I was 12, she told me that her stepfather George Stinson was having sex with her about once a month. He would give her $20 each time. [Theodise] said "George threatens me if I tell anyone what he's doing to me." She also begged me not to tell anyone else. She said: "If I tell anyone, he'll hurt me and my family."
>
> [Theodise] said this was going on for about 1-1/2 years when she told me about [it.] 6 or 7 months later is when Lenora Collins was murdered. [10]
>
> He would have sex with her inside their house during the day when their mother was at work. Sometimes he'd take [Theodise] with him in the red Ford truck he drove. He would just take [Theodise] with him, not Joseph, once a month. After she first told me, she'd cry + tell the same story about George.

---

[9] The doubt which the discrepancy between the two children's descriptions casts on their credibility is complemented by another troubling inconsistency: at Monroe's first trial Joseph could not remember how Monroe purportedly had been dressed, but two years later at Monroe's second trial, Joseph did provide a purported description (Tr. 121-22).

[10] The timing of events bolsters Davis' credibility, for Davis indicates that Theodise told of Stinson abusing her at precisely the time that Theodise herself has said that Stinson moved out of the Collins house.

The Davis Statement casts grave doubts on the credibility of Theodise's testimony, for it is new and independent evidence that, contrary to Theodise's denials, Theodise was mistreated by Stinson and that Stinson threatened — and terrified — Theodise. [11/]

The Davis Statement suggests that the Collins murder might have resulted from a crisis arising out of Stinson's sexual abuse of his ex-wife's preteenage daughter. Any number of events could have ignited the tensions building up in such an unstable triangle, prompting Stinson to murder Collins in keeping with his pattern of stabbing estranged wives in a jealous rage. The unbearable pressures which such a situation must have exerted on a young girl — the guilt, shame, confusion, pain — might well have prevented Theodise from telling the truth, being able to face the truth, or even any longer knowing the truth.

In short, the Davis Statement renders it even more likely that Stinson intimidated the Collins children into pinning the blame for his violent deed on Monroe. [12/]

5. Confirmation that Monroe's Hand Was Cut in a Barroom Fight on the Evening of the Collins' Murder

Monroe has consistently maintained that some blood stains on a sheet, bedspread, and towel (seized by the policemen who arrested Monroe in the early morning shortly after Collins' murder) came from a stab wound to his hand suffered earlier in the evening in a fight outside of Ollie's Bar, a neighborhood tavern (Tr. 59j, 59k; Ex. 21 at 103, 105, 108–10), not from cutting his own hand while stabbing Collins, as the prosecutor speculated to the jury (Tr. 91, 201a).

Although Monroe's trial counsel never investigated the fight (Ex. 18, ¶ 9), several people, whom appellate defense counsel found after trial, saw Monroe in Ollie's Bar on the night of Septem-

---

[11/] Theodise's credibility is also impeached by Sterling Pye's previously discussed Affidavit (Ex. 14), which shows that, contrary to Theodise's denials, she did see and speak with Stinson the evening of the crime.

[12/] In this context, it should be noted that Stinson, who was sentenced to ten to twenty years for the brutal Lofton slaying, is now out on parole and twice has been granted permission to visit Louisiana (Exs. 3, 4).

ber 9–10, 1977 and knew that Monroe had injured his hand in a fight there.

Monroe's friend Flora Grant has signed a Statement dated September 30, 1988 providing details of Monroe's scuffle at Ollie's Bar that night (Ex. 11). Grant reports that sometime around midnight, Monroe got into an argument at the pool table with Allen ("Queenie") Johnson (*id.* at 3–6). Johnson hit Monroe, Monroe then followed Johnson out the front door, Johnson hit Monroe again, a fight ensued, and Monroe began bleeding from his mouth and nose and perhaps elsewhere as well (*id.* at 3–6). After the fight, Grant saw Monroe wrap a white handkerchief around one of his hands (*id.* at 6).

Allen Johnson signed two Statements, one dated October 25, 1988 (Ex. 12), the other November 3, 1988 (Ex. 22). Although Johnson's October 25 Statement does not recount a fight between Johnson and Monroe at Ollie's Bar that night, Johnson's November 3 Statement does. Johnson recounts that Monroe and he "had some kind of misunderstanding" at Ollie's Bar; that, while they were fighting, Johnson "grabbed and broke a bottle"; that Monroe somehow cut his hand; that "there was some blood"; and that Monroe might have wrapped a handkerchief around his cut hand. Johnson's description of the fight is consistent with other accounts. [13/]

In short, substantial evidence is now available to demonstrate that the blood in Monroe's house came from the hand which Monroe injured at the bar, not from killing Collins.

* * *

The jury which convicted Monroe never had the opportunity to consider a single piece of the new evidence that shows that Stinson may have murdered Collins. Obviously if Stinson murdered Collins, Monroe, by logical necessity, could not have done so (*see* App. D at 4). Indeed, it now is clear that, at the very least, Monroe's guilt is a question about which reasonable people can — and have — disagreed.

13/ Other consistent accounts were obtained in December 1983 by Katherine Quigley — at the time a twenty-five year old student who spoke with Monroe's cousin Jonell Morgan and the bar owner and bartender Ollie Winfield (Ex.16, ¶¶ 6-9).

After reviewing only some of the new evidence of Monroe's innocence, a federal magistrate, a federal judge, four unanimous members of the Louisiana Pardon Board and probably three justices of the Louisiana Supreme Court have all indicated grave doubts about Monroe's guilt.

B. Execution of a Person Despite Reasonable Doubt as to Guilt Would Violate the Eighth Amendment

The Eighth Amendment requires special "reliability in the determination that death is the appropriate punishment in the specific case." *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). Because of this special reliability requirement, this Court has "[t]ime and again . . . condemned procedures in capital cases that might be completely acceptable in an ordinary case." *Satterwhite* v. *Texas*, 108 S. Ct. 1792, 1801 (1988) (Marshall, J., concurring). [14]/ *See also Beck* v. *Alabama*, 447 U.S. 625, 638 (1980) (normal procedural rules must give way in the capital case where they "diminish the reliability of the sentencing determination"). This case presents the important issueof whether in a capital case, a federal consitutional standard exists prohibiting the execution of a defendant after newly discovered evidence creates a reasonable doubt as to guilt and renders the originalevidence, upon which the conviction and death sentence were based, incomplete and hence unreliable.

---

[14]/ *E.g.*, *Booth* v. *Maryland*, 107 S. Ct. 2529 (1987) (victim impact statement prohibited in capital cases); *Zant* v. *Stephens*, 462 U.S. 862 (1983) (capital punishment must be limited to defendants who committed murder with aggravating circumstances); *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982) (sentencing jury in capital cases must be allowed to consider any relevant mitigating evidence); *Beck* v. *Alabama*, 447 U.S. 625 (1980) (guilt-phase jury in a capital case must be allowed to consider guilt of a lesser included, non-capital offense); *Green* v. *Georgia*, 442 U.S. 95 (1979) (state hearsay rule may not exclude the introduction of mitigating evidence in capital sentencing hearing); *Presnell* v. *Georgia*, 439 U.S. 14 (1978) (a state appellate court may not affirm a death sentence on unrelated independent grounds after finding error in the reasons cited by the trial court); *Gardner* v. *Florida*, 430 U.S. 349 (1977) (reliance on confidential presentence report prohibited in capital sentencing); *Gregg* v. *Georgia*, 428 U.S. 153 (1976) (statute guiding sentencer's discretion required for capital cases); *Woodson* v. *North Carolina*, 428 U.S. 280 (1976) (statute making death penalty mandatory for first degree murder invalidated); *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968) (special jury selection procedures needed in capital cases).

Such a federal constitutional standard simply effectuates the humane and sensible Eighth Amendment mandate that the law construct safeguards to ensure "that the sentence [of death] was not imposed out of . . . mistake." *Eddings* v. *Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring). The reliability required by the Eighth Amendment surely must include the chance to correct factual mistakes on the central issue of guilt or innocence discovered before the actual imposition of the death sentence itself.

The essential safeguard of reliability in a capital case is the guarantee that all relevant evidence has been considered by the sentencer. But a death sentence rendered by a sentencer who knew nothing of new evidence of innocence unconstitutionally deprives the defendant of an individualized sentencing determination. *See Woodson* v. *North Carolina*, 428 U.S. 280, 304–05 (1976) (plurality opinion). Like death sentences made mandatory by statute, a death sentence imposed before the appearance of substantial new evidence of innocence effectively deprives the defendant of an individualized sentencing determination handed down by a sentencer with sufficient information to make that determination. *See id.*; *Sumner* v. *Shuman*, 107 S. Ct. 2716 (1987). *See also Gardner* v. *Florida*, 430 U.S. 349 (1977) (due process is denied when the death sentence in part was based on informationwhich the defendant had no opportunity to rebut, deny or explain). The unconstitutionality of such a death sentence is made even more egregious where, as here, the State permits consideration of residual doubt as a legitimate mitigating circumstance in penalty phase deliberations. *See State* v. *Lee*, 524 So. 2d 1176, 1192 (La. 1988).

Because of the "greater degree of scrutiny [required] of the capital sentencing determination," *California* v. *Ramos*, 463 U.S. 992, 999 (1983), the high state law standard for granting a new trial because of new evidence — applicable to all other criminal cases — cannot determine when an execution is prohibited because of new evidence of innocence. The greater scrutiny required in capital cases mandates that the federal constitutional standard must preclude execution whenever new evidence creates a reasonable doubt as to guilt. Where, as here, a federal court has found a reasonable doubt as to the guilt of a person sentenced to death, and where, as here, further substantial evidence of innocence has been uncovered post-trial, the danger of exe-

cuting an innocent man is simply too great to be accommodated by the Eighth Amendment. *See Lindsey* v. *King*, 769 F.2d 1034, 1043 (5th Cir. 1985) ("This is a capital case . . . and one moreover in which . . . there is a real possibility that the wrong man is to be executed. In such a case, if ever, petitioner should receive the benefit of the doubt.").

For these reasons, Monroe's conviction and death sentence must be set aside.

II

THIS COURT SHOULD GRANT THE WRIT BECAUSE MONROE IS MENTALLY RETARDED AND THEREFORE HIS EXECUTION WOULD BE CRUEL AND UNUSUAL PUNISHMENT

The courts below declined to grant Monroe post-conviction relief based on his claim that he is mentally retarded and that his execution, therefore, would be cruel and unusual punishment in violation of his Eighth Amendment rights.

This Term, this Court will determine whether the Eighth Amendment prohibits execution of a mentally retarded person. *See Penry* v. *Lynaugh*, 108 S. Ct. 2896 (1988) (argued Jan. 11, 1989).

A. Monroe Is Mentally Retarded

A psychological assessment conducted by Marc Zimmermann, Ph.D., indicates that Monroe has a full scale I.Q. of only 77. *See* Affidavit of John J. McGee, dated August 17, 1988 (Ex. 1, Ex. A). Based on that psychological assessment, as well as other material on Monroe's background, John J. McGee, Ph.D., has concluded that Monroe is borderline retarded. Dr. McGee states (*id.*, ¶ 4):

> Mr. Monroe functions in the borderline level of mental retardation. This dimension of retardation leaves the individual functioning intellectually and emotionally as a child would in the 10–12 year old age range. In other words, the individual is quite capable of taking care of himself in daily care skills and integration in the community, but is incapable of sorting through the more complex social demands of living without external support. According to Dr. Zimmermann's re-

> port, Ronald's reading skills are at the third grade level. . . . In practice, this means that Mr. Monroe is extremely handicapped in the area of cognitive, that is, understanding, skills. He can operate independently, but is limited in understanding the complexities of the surrounding world.

Several psycho-social factors in Monroe's background have exacerbated his intellectual deficiencies. As Dr. McGee has noted (*id.*, ¶ 6):

> He was one of thirteen children, the result of six different common-law unions. He "completed the sixth grade," but failed the first, third, and fourth grades. . . . He "attended school dirty and poorly dressed, tired and hungry and begged children for some of their lunch." Later he held a series of part-time or short-term jobs, but he was never able to maintain a steady form of employment.

In combination, these factors resulted in completely inadequate social support, dramatically limiting Monroe's ability to function in society and impairing his adaptive behavior (*id.*, ¶ 7):

> In short, given Mr. Monroe's history of school failure, possible allied psychiatric problems, unstable home life, and poverty, it is fair to assume that the negative effects of his borderline intelligence were exacerbated, further diminishing his ability to understand the surrounding world, the nature of social acts, the consequences of his behavior, and his ability to speak for himself.

Monroe's intellectual deficiencies and adaptive behavior impairments are characteristic of mental retardation.

The American Association on Mental Deficiencies ("AAMD"), [15/] the principal professional organization in the field of mental retardation, defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. . . ." AAMD, *Manual on Terminology and Classification in Mental Retardation* 11 (H. Grossman ed. 1983).

15/ In October 1987, the American Association on Mental Deficiencies changed its name to the American Association on Mental Retardation ("AAMR").

The AAMD states that the upper boundary of intellectual functioning characterizing mental retardation "could be extended upward through an I.Q. of 75 or more, depending upon the reliability of the intelligencetests used." *Id.* The impairments in adaptive behavior characterizing mental retardation, according to the AAMD, include "significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence and/or social responsibility that are expected for his or her age level and cultural group, as determined by clinical assessment and, usually, standardized scales." *Id.*

Thus, as a result of Monroe's deficit in intellectual functioning and impairment in adaptive behavior, he must be classified as mentally retarded.

B. The Execution of a Mentally Retarded Person Violates the Eighth Amendment

1. Contemporary Standards Define Cruel and Unusual Punishment

In determining whether the Eighth Amendment prohibits the State from executing a mentally retarded person, this Court must consider information which sheds light on the "evolving standards of decency that mark the progress of a maturing society." *Thompson* v. *Oklahoma*, 108 S. Ct. 2687, 2691 (1988) (pulrality opinion).

Available indices show that the execution of a mentally retarded person offends contemporary standards of decency:

- Recent surveys indicate that most people oppose capital punishment for the mentally retarded. [16/]

- The public outcry after the 1986 execution of a mentally retarded defendant in Georgia prompted the Georgia

---

[16/] *E.g.*, D. Johnson & A. Booth, Bureau of Sociological Research, University of Nebraska, Nebraska Annual Social Indicator Survey (Jan. 1988); Analysis Group Inc., Capital Punishment in Connecticut (May 1986); Center for Public and Urban Research, Georgia State University, Georgia Residents' Attitudes Toward the Death Penalty, the Disposition of Juvenile Offenders, and Related Issues (Dec. 1986); Cambridge Research Survey, Analysis of Attitudes Toward Capital Punishment in Florida (June 1985).

legislature to enact a statute prohibiting the execution of persons found "guilty but mentally retarded." [17/]

- The death penalty provision of the recenty enacted Anti-Drug Abuse Act of 1988 exempts the mentally retarded. [18/]

- The American Bar Association has stated that mental retardation is a factor mitigating against assessing the maximum punishment of death. ABA Standards For Criminal Justice § 9.3 (1980).

- This year the AAMR council resolved that since "mental retardation is a substantially disabling condition which may affect an individual's ability to appreciate and understand fully the consequences of actions, and which may impair the individual's ability to conform his or her conduct to the requirements of the law . . . *no person who is mentally retarded should be sentenced to death or executed.*" Resolution of AAMR (1988) (original emphasis).

Since the execution of a mentally retarded defendant contravenes contemporary standards of decency, such an execution is a cruel and unusual punishment.

2. The Execution of the Mentally Retarded Presents a Parallel Issue to the Execution of Juveniles

The issues presented in considering whether the Eighth Amendment bars the execution of the mentally retarded are the same as those presented in considering whether the Eighth Amendment bars the execution of those who commit offenses when younger than 16 — the offender's culpability and the death penalty's social purposes of retribution and deterrence. *See Thompson* v. *Oklahoma*, 108 S. Ct. 2687, 2698–700 (1988) (plurality opinion).

17/ *Georgia Bars the Execution of Retarded Killers*, N.Y. Times, Apr. 12, 1988, at A26, col. 4; Ga. Code Ann. § 27-1503(j) (1988).

18/ *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

a. Diminished Culpability

The plurality opinion in *Thompson* noted the general agreement "that punishment should be directly related to the personal culpability of the criminal defendant." *Id.* at 2698. The plurality opinion recognized that "minors often lack the experience, perspective and judgment expected of adults," and often "are more vulnerable, more impulsive and less self-disciplined than adults." *Id.* This analysis applies with equal force to mentally retarded defendants, who are also vulnerable to engaging in impulsive and undisciplined behavior (Ex. 1, ¶ 9).

Furthermore, the *Thompson* plurality found that a juvenile was less culpable than an adult because "[i]nexperience, less education, and *less intelligence* make the teenager less able to evaluate the consequences of his or her conduct . . . ." *Thompson* v. *Oklahoma*, 108 S. Ct. 2687, 2699 (1988) (plurality opinion) (emphasis added). These same considerations obtain where, as here, the defendant's mental capacities are congenitally limited.

Since reduced culpability attaches to a mentally retarded offender, the execution of such an offender is a cruel and unusual punishment.

b. Inapplicability of Retribution or Deterrence

According to this Court, the death penalty is said to serve the social purposes of retribution and deterrence. *Gregg* v. *Georgia*, 428 U.S. 153, 183 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

While retribution often may be a legitimate "expression of society's moral outrage for particularly offensive conduct," *id.*, the *Thompson* plurality found that in light of the juvenile offender's lesser culpability and "society's fiduciary obligations to its children," retribution "is simply inapplicable to the execution of a 15-year-old offender." *Thompson* v. *Oklahoma*, 108 S. Ct. 2687, 2699 (1988) (plurality opinion). Similarly, in light of the mentally retarded defendant's lesser culpability and society's fiduciary obligations to the mentally retarded, retribution is inapplicable to the execution of the mentally retarded offender.

As to deterrence, the mentally retarded are less likely to be deterred by a particular sentence than people of normal intelligence. The mentally retarded — whose moral development allow only immature concepts of blameworthiness and causation, Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 429 (1985) — are likely to attach little, if any, significance to possible future punishment for their actions. *See Thompson* v. *Oklahoma*, 108 S. Ct. 2687, 2700 (1988) (plurality opinion) ("The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.").

Since executing the mentally retarded, like executing juveniles, cannot make "any measurable contribution to the goals [of] capital punishment," its imposition would be "the purposeless and needless imposition of pain and suffering . . . and thus an unconstitutional punishment." *Id.*

Accordingly, Monroe's death sentence violates the Eighth Amendment and must be set aside.

III

THIS COURT SHOULD GRANT THE WRIT BECAUSE THE ADMISSION OF INFORMATION OF THE CRIME'S IMPACT ON THE VICTIM'S FAMILY VIOLATED THE MANDATE OF *BOOTH* V. *MARYLAND*

At Monroe's sentencing hearing, the introduction of testimony of the victim's relatives and the arguments made by the prosecution in summation spotlighted "the emotional impact of the crimes on the family" — creating the "constitutionally unacceptable risk that the jury may [have] impose[d] the death penalty in an arbitrary and capricious manner." *Booth* v. *Maryland*, 107 S. Ct. 2529, 2533 (1987). *See also South Carolina* v. *Gathers*, 369 S.E.2d 140 (S.C.), *cert. granted*, 109 S. Ct. 218 (1988).

In *Booth*, the prosecutor read to the jury a victim impact statement ("VIS") based on interviews with the victims' relatives. The statement "noted how deeply the [victims] would be missed" and "described the emotional and personal problems the family members

have faced as a result of the crimes." *Booth* v. *Maryland*, 107 S. Ct. 2529, 2531 (1987). The statement concluded with a state official's conclusion that the murder "is still such a shocking, painful, and devastating memory to [the victims' relatives] that it permeates every aspect of their daily lives. It is doubtful that they will ever be able to fully recover from this tragedy and not be haunted by the memory of the brutal manner in which their loved ones were murdered and taken from them." *Id.* at 2531–32. This Court held "that the introduction of such a VIS at the sentencing phase of a capital murder trial violates the Eighth Amendment. . . ." *Id.* at 2536.

While this Court understood "the grief and anger" of a murder victim's relatives, *id.*, it "reject[ed] the contention that the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics, are proper sentencing considerations in a capital case." *Id.* at 2535. Rather, the proper focus of the capital sentencing hearing must be the "blameworthiness of a particular defendant." *Id.* at 2534.

The testimony and prosecutorial argument at Monroe's sentencing hearing injected precisely the type of irrelevant material that creates "a constitutionally unacceptable risk" of "an arbitrary and capricious" imposition of the death penalty forbidden by *Booth*. *See id.* at 2533.

Testimony of the victim's relatives from the guilt hearing was incorporated into the penalty hearing (Tr. 209–10). The prosecution repeatedly tried to elicit from these witnesses statements regarding the personal hardship suffered by them and the victim's other relatives as a result of her death (Tr. 77–78, 125–26, 134, 144).

The prosecution built upon this prejudicial and impermissible testimony in closing statements. First, the prosecution talked about the financial and emotional effect of the victim's death on her two children (Tr. 244–45):

> Of course, [a particular defense mitigation witness] doesn't mention the victim, Mrs. Lenora Collins, what her financial status, how it has affected her family. How her two children have to hear those screams every day for the rest of their lives. Now they have to grow up without a mother.

The prosecution persisted, inviting the jury to impose a death sentence based upon the possible emotional impact of the death on the victim's family and even the hypothetical future emotional impact (Tr. 248):

> She died not knowing whether her children are even alive to testify today. And the psychological and mental impact on these children having to see that is by itself worthy of his getting the same penalty that he gave to Lenora Collins. And there is denying [sic] that. That psychological impact on those children will be there forever. Those tears you saw from Theodise during the trial will not be limited to today. It will be tomorrow, and the next day, when she has children and every time when her children ask where grandma is, what are you going to tell them, and why did she die, and nobody can give the reason for that. So that mother was screaming that night, Lenora Collins was screaming that night and it is your duty and my duty to do the screaming for her now because she can't do it for herself.

Far from trying to cure the error in the prosecution's improper argument, the trial court permitted and even encouraged it, overruling defense counsel's objections (Tr. 245–48). The trial court even failed to instruct the jury that such closing argument was not evidence.

Thus, the Monroe jury heard information that suffered from the same defects as the *Booth* information. At Monroe's hearing, as in *Booth*, the information dealt with how deeply the victim would be missed, the emotional and personal problems faced by family members because of the crime, and the long-lasting effects of the tragedy.

The improper prosecution argument clearly prejudiced Monroe's sentencing hearing since, as the Louisiana Supreme Court has recognized, Monroe's "jury came close to a deadlock on the penalty. . . ." *State* v. *Monroe*, 397 So. 2d 1258, 1270 (La. 1981). Thus, improper prosecution argument might have been the deciding factor which led the jury to impose death.

The improper information heard by the Monroe jury violated the Eighth Amendment every bit as much as the improper information in *Booth*. Thus, Monroe's death sentence must be set aside.

IV

THIS COURT SHOULD GRANT THE WRIT BECAUSE THE PROSECUTION ARGUMENT THAT THE JURY LACKED FULL RESPONSIBILITY FOR ITS SENTENCING VERDICT VIOLATED THE MANDATE OF *CALDWELL* V. *MISSISSIPPI*

Throughout his closing statement, the prosecutor tried to diminish the jury's sense of responsibility in deciding whether to impose a death sentence. First, the prosecutor argued to the jury that "the Louisiana Supreme Court reviews each case in which the death penalty is imposed." (Tr. 253.) The trial judge overruled defense counsel's objection (Tr. 254). Later, the prosecution invited the jury to "*recommend* to the court, to the Supreme Court, that this man be given the death penalty." (Tr. 258) (emphasis added). [19/]

In *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985), this Court held "that it is constitutionally impermissible to rest the death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328–29. This Court explained that it "has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.' " *Id.* at 341.

In *Caldwell*, the prosecution urged the jury not to view itself as making the final decision on whether the defendant would die because a death sentence would be reviewed for correctness by the Mississippi Supreme Court. *Id.* at 323. Rather than correct the prosecution's remarks, the trial judge told the jury that the remarks were

---

19/ The prosecution made other attempts to diminish the jury's sense of responsibility as well. During summation, the prosecution argued that the petitioner deserves the penalty by saying: "And don't let anyone put you on a guilt trip and say you are pushing the button, you are the one who's doing this to him, because he is doing it to himself." (Tr. 247.) The prosecution concluded its summation by declaring: "I ask you for nothing unusual ladies and gentlemen. I ask you for no harsh penalties. I ask you for nothing out of the ordinary." (Tr. 258.)

proper and necessary. *Id.* at 339. This Court, however, explained why "state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court" creates the risk of "substantial unreliability as well as bias in favor of death sentences." *Id.* at 330. In so doing, this Court noted, *inter alia*, the following (*id.* at 333):

> [O]ne can easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

This problem is especially serious when the jury is told that the alternative decision makers are the justices of the state supreme court.

The constitutional errors at Monroe's hearing and in *Caldwell* are precisely the same. As in *Caldwell*, the prosecution at Monroe's hearing told the jury that the state supreme court would review any death sentence. As in *Caldwell*, the trial judge at Monroe's hearing failed to correct the prosecution's improper remarks butrather indicated that they were proper. And where, as at Monroe's hearing, the jury explicitly told the trial judge that it was divided on the proper sentence, "one can easily imagine that" — in the words of the *Caldwell* Court — "the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in."

Thus, as in *Caldwell*, the death sentence here "does not meet the standard of reliability that the Eighth Amendment requires," *see id.* at 341, and must be set aside.

V

THIS COURT SHOULD GRANT THE WRIT BECAUSE THE SUBSTANTIAL PROBABILITY THAT SOME JURORS VOTED TO IMPOSE THE DEATH PENALTY ON THE REASONABLE, BUT MISTAKEN, BELIEF THAT ALL TWELVE JURORS HAD TO AGREE ON THE EXISTENCE OF A MITIGATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT VIOLATED THE MANDATE OF *MILLS* V. *MARYLAND*

Based upon the verdict form and instructions given by the trial judge at Monroe's sentencing hearing, the jurors "well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Mills* v. *Maryland*, 108 S. Ct. 1860, 1870 (1988).

The verdict forms used by the trial judge were hopelessly defective, requiring unanimity for imposing a life sentence, but conspicuously silent as to any unanimity requirement for imposing the death sentence on the basis of a statutory aggravating circumstance (Tr. 262) (emphasis supplied):

> The first form of verdict reads: "Having found the below listed statutory aggravating circumstance or circumstances, and after consideration of mitigating circumstances offered, the jury recommends that the defendant be sentenced to death."
>
> * * *
>
> The second form of verdict reads: "The jury *unanimously* recommends that the defendant be sentenced to life imprisonment, without benefit of probation, parole or suspension of sentence."

Since a life sentence requires consideration of mitigating circumstances, there was a substantial risk that some jurors reasonably concluded that mitigating circumstances must be found unanimously.

In his instructions, the trial judge repeatedly encouraged the incorrect presumption of a unanimity requirement for finding a mitigating circumstance. Since a reasonable juror might have as-

sumed symmetry between aggravating and mitigating circumstances, the trial judge's instruction that the jury had to "unanimously agree to find beyond a reasonable doubt that at least one statutory aggravating circumstance exists" before imposing a death sentence (Tr. 259) wrongly suggested that the jury also had to unanimously agree beyond a reasonable doubt that a particular mitigating circumstance existed before imposing a life sentence. The trial judge's repeated confounding of mitigating with aggravating circumstances (Tr. 258, 261, 262) reinforced the substantial risk that reasonable jurors incorrectly believed that mitigating circumstances, like aggravating circumstances, had to be found unanimously beyond a reasonable doubt.

The trial judge's jury instructions on finding mitigating circumstances also misleadingly discouraged jurors from adhering to their individual convictions concerning mitigating circumstances by continuously referring to the jury as a single decision-making unit (Tr. 260, 261). In so doing, the trial judge probably led reasonable jurors to conclude that a mitigating factor could be considered only if every other juror agreed to consider it as well.

The verdict form and judge's instructions at Monroe's sentencing hearing created the same "substantial risk that the jury was misinformed" which this Court found unacceptable in *Mills* v. *Maryland*, 108 S. Ct. 1860, 1869 (1988). In *Mills*, "a reasonable jury could have [concluded] from the instructions given by the trial judge and from the verdict form," *id.* at 1866, that "even if *some* or all of the jurors were to believe some mitigating circumstance or circumstances were present, unless they could unanimously agree on the existence of the *same* mitigating factor, the sentence necessarily would be death." *Id.* at 1864 (emphasis in original). Because "the sentencer must be permitted to consider all mitigating evidence," *id.* at 1870, this Court vacated the death sentence.

Since the possible misunderstandings by reasonable jurors "as to unanimity and the consideration of mitigating evidence by individual jurors," *id.* at 1869, are precisely the same here as in *Mills*, the death sentence against Monroe violates the Eighth Amendment and must be set aside.

CONCLUSION

For all of the foregoing reasons, petitioner prays that this Court grant the writ of certiorari.

January 11, 1989

Respectfully submitted,

Allan Blumstein
(Counsel of Record)
Douglas G. Morris
Jonathan J. Freedman

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

- and -

John DiGiulio
331 St. Ferdinand
Baton Rouge, Louisiana 70802
(504) 383-0078

Attorneys for Petitioner
Ronald S. Monroe

APPENDIX A

CRIMINAL DISTRICT COURT FOR
THE PARISH OF ORLEANS

STATE OF LOUISIANA

No. Section "F"

Ronald S. Montroe, Prison No. 90920
Louisiana State Penitentiary, Angola,

Petitioner

Versus

Hilton Butler, Warden
Louisiana State Penitentiary, Angola

ORDER

HAVING CONSIDEDRED [sic] fully the claims raised by petitioner in his application for Post-Conviction Relief and Motion for A Stay of Execution, and having determined that the claims are insufficient to justify relief,

IT IS HEREBY ORDERED that:

1. Petitioner's Application for Post-Conviction Relief is DENIED; and,

2. Petioner's Motion for Stay of Execution is DENIED.

THUS DONE, this 22nd day of August, 1988.

/s/ DENNIS J. WALDRON
JUDGE DENNIS J. WALDRON

APPENDIX B

THE SUPREME COURT OF THE STATE OF LOUISIANA

STATE EX REL
RONALD S. MONROE

VS. NO.88-KP-2191

HILTON BUTLER, WARDEN
LOUISIANA STATE PENITENTIARY

- - - - - -

IN RE: Monroe, Ronald S.; - Plaintiff(s); Applying for Supervisory and/or Remedial Writs; Parish of Orleans Criminal District Court Div. "F" Number 261 - 647

- - - - - -

October 14, 1988
Stay order vacated. Writ Denied.

HTL
WFM
JCW
LFC

LEMMON, J., concurs in the denial and assigns reason.

DIXON, C.J., CALOGERO & DENNIS, JJ., would grant the writ.

Supreme Court of Louisiana
October 14, 1988

/s/ Deputy Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA
NO. 88-KP-2191
STATE OF LOUISIANA

versus

RONALD MONROE

JUSTICE LEMMON, Concurring in the Denial of the Application

I voted to stay the execution in order to secure additional time for review of the identification issue, although this court denied certiorari on precisely the same issue eleven months ago.[1/]

Relator was convicted on rock solid identifications provided immediately after the murder by the victim's two children, then aged twelve and eleven years old respectively. The children informed their aunt in separate conversations that relator, who was their next door neighbor and well known to both of the children, had broken into their house and stabbed their mother. Indeed, the younger child was herself the victim of a vicious stabbing by the murderer.

Every court which considered this conviction on direct review concluded that relator received a fair trial and that there was no question as to the reliability of the Jury's decision.

Six months after the conviction new evidence surfaced which possibly suggested that George Stinson, the victim's former live-in lover from whom the victim had separated five months before the murder, may have been the murderer. Although this information was provided to the New Orleans Police Department, the authorities declined to investigate because relator had already been convicted of the murder. They further failed to provide this information to relator or his attorney. This unconscionable failure to provide relator due process was ultimately recognized by the federal district court, which ordered the state court to conduct an evidentiary hearing to determine

---

1/ In No. 87-KP-0574, this court denied certiorari, with Justices Calogero and Dennis voting to grant.

whether relator should be granted relief. It is important to note that the due process violation did not entitle relator to a new trial, but rather entitled relator to file an otherwise untimely motion for a new trial based on newly discovered evidence and to have an evidentiary hearing on whether that newly discovered evidence warranted the granting of a new trial.

Under the appropriate standards at a hearing on a motion for a new trial based on newly discovered evidence, the trial judge does not weigh the overall evidence (including the newly discovered evidence), but rather determines whether the the newly discovered evidence is of sufficient quality to create a reasonable doubt which did not otherwise exist and to warrant a decision on guilt by a new jury. State v. Talbot, 408 So.2d 861 (La. 1981); State v. Prudholm, 446 So.2d 729 (La. 1984). The question before the court now (and also in No. 87-KP-0574 decided in September 1987) is whether the trial judge properly applied this standard on remand from the federal court.

There were several items of newly discovered evidence. The first was the testimony by relator's mother that Stinson was at the victim's home the evening before the murder and said he would return later. No other evidence was provided to support the testimony of this obviously biased witness. On the other hand, the state presented evidence that the mother had attempted to have another witness offer perjured testimony which would provide her son with an alibi.

The second item of evidence was a statement by Francis McWilliams, an inmate who shared a jailcell in Michigan with Stinson after Stinson had been arrested for the murder of his wife in Michigan. McWilliams told police officers that Stinson had not only admitted killing his wife in Michigan by stabbing her in the chest and neck, but also stated his common law wife in New Orleans had "died the same way".[2/] During his interview with the Michigan police, McWilliams

---

2/ This statement to the Michigan police was the information provided to the New Orleans authorities who declined to investigate further or to disclose the information to relator or his counsel.

also produced notes written by him shortly after his conversation with relator, which included the following notation:

> "What happened to your wife in New Orleans?
> 'The same thing that happened to this one.'
>
> "You mean you knocked her off too? 'Ya,'
> he said with a positive nod of his head.
>
> "You know behind this case here; they may start investigating you on that New Orleans case. 'They already got some guy for that. I was cleared [sic].' I would still let my attorney know about it so he won't be surprised."

When questioned about this statement in Michigan, Stinson admitted that he told McWilliams that his common law wife in New Orleans had died the same way as his Michigan wife, but denied he had stated that he was the one who administered the stabbing.

Significantly, McWilliams was brought to New Orleans to testify in the 1987 hearing in state court ordered by the federal district court, but was not called by either side to testify. Therefore, neither his hearsay statement to the Michigan police nor his hearsay handwritten notes were corroborated by the available testimony of the declarant.

The third item of evidence was provided by Stinson's first wife whom he had stabbed in the chest and neck in 1959 and left for dead. This evidence had some probative value as to Stinson's propensity to stab his mate in the chest and neck when provoked, but did not provide any direct link between Stinson and the New Orleans murder.

This court reviewed the exact same evidence last year in No. 87-KP-0574 and declined to grant relief. Relator's mother's statement is suspect, McWilliams was not called to testify to corroborate his prior statement to the police and his handwritten notes or to rebut Stinson's denial of the contents of a portion of the statement, and Stinson's first wife's testimony, standing alone, has little probative value. After reconsidering the entire matter, I have again concluded that the

newly discovered evidence does not rise to a level of quality which would create a reasonable doubt not previously existing or would warrant presentation of the issues of guilt or sentence to a new jury.

APPENDIX C

THE SUPREME COURT OF THE STATE OF LOUISIANA

STATE EX REL RONALD S. MONROE

VS. NO.88-KD-2654

HILTON BUTLER, WARDEN
LOUISIANA STATE PENITENTIARY
ANGOLA, LOUISIANA

- - - - - -

IN RE: Monroe, Ronald; - Plaintiff(s); Applying for Supervisory and/or Remedial; Parish of Orleans Criminal District Court Div. "F" Number 261 - 647

- - - - - -

November 23, 1988
Stay order vacated. Writ Denied.

LFC
JAD
WFM
JCW
HTL

CALOGERO & DENNIS, JJ., would grant the writ.

Supreme Court of Louisiana
November 23, 1988

/s/ Deputy Clerk of Court
For the Court

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONALD S. MONROE	*	CIVIL ACTION
VERSUS	*	NO. 83-6277
ROSS MAGGIO, WARDEN, LOUISIANA STATE PENITENTIARY, ANGOLA, ET AL	*	SECTION "F" (5)

MEMORANDUM OPINION

This matter came before the Court on the Petition of Ronald S. Monroe for a Writ of Habeas Corpus, and was referred to United States Magistrate Livaudais for an evidentiary hearing. 28 U.S.C. 636 (6)(1)(B). Pursuant to the Court's order the Magistrate held an evidentiary hearing and issued findings and recommendations.

On February 14, 1984 the respondents filed objections to the Magistrate's findings and recommendations. When objections to a Magistrate's report are filed the Court is required to make de novo findings as to all portions of the report that are subject to an objection. 28 U.S.C. 636(b)(1)(c). After carefully considering the transcript of the evidentiary hearing as well as all supporting documents in light of the respondents' objections, the Court believes that the Magistrate's findings and recommendations are without error, and the Court adopts the Magistrate's report as its own findings and conclusions. In compliance with the mandate of 28 U.S.C. 636 (b)(1)(c) the Court is issuing this Memorandum Opinion in order to address the respondents' objections to the report.

The respondents first complain about the Magistrate's conclusion that the petitioner's complaint does not raise a claim that is cognizable under the theory of *Brady v. Maryland* 373 U.S. 83 (1964) and its progeny. In this regard they raise three objections.

First, they contend that petitioner's claim is nothing more than a request for a new trial based on newly discovered evidence. This con-

tention is clearly in error. The petition, accompanying legal memoranda and the issues raised at the evidentiary hearing clearly indicate that petitioner bases his request for relief in Federal court on the fact that during the post-conviction relief period the State possessed exculpatory evidence and failed to turn it over the the defendant. Such a claim is cognizable under *Brady*.

Second, the respondents contend that the State is under no duty to give a defendant exculpatory evidence which was obtained after the defendant was convicted. In granting petitioner's request for a stay of execution, the Court held that the duty to disclose exculpatory material continues beyond the trial of a criminal case up to and including the time that an accused may apply for a new trial. *In re Petition of Larry James Wright*, 282 F.Supp. 999 (W.D. Ark. 1968). The State points to the fact that the Court in *Wright* failed to cite *Brady* and argues that this case does not impose a continuing obligation under *Brady*, to disclose exculpatory evidence. This argument exalts form over substance and is without merit. The *Brady* cases stand for the proposition that due process is denied because the trial is fundamentally unfair when the prosecution fails to give the defendant exculpatory evidence that is material to an accused's guilt or innocence. These cases turn on the belief that society benefits when our system of criminal justice is fair, and rejects the sporting notion of justice. These same concerns were expressed by the court in *Wright*. In that case Judge Miller held that it was unfair and a violation of due process for a prosecutor to withhold exculpatory evidence which was acquired while the accused could file a motion for a new trial. The analysis used in *Wright* closely parallels the reasoning applied in *Brady*. It supports this Court's holding that it is fundamentally unfair and contrary to society's notions of justice for a prosecutor to withhold material exculpatory evidence which he acquires while the defendant is entitled to file a motion for a new trial. *Wright* did not cite *Brady*, but it clearly adopted *Brady's* mandate and purpose.

Third, the respondents contend that *Wright* is distinguishable because the facts that were in prosecutor's possession were more credible and were more clearly probative than the material held by the police

authorities in New Orleans. This objection goes to the standard of materiality will be examined in this opinion.

The respondents complain that the information given to the New Orleans police is based on hearsay and rumor and is, therefore, not credible.

To the extent that this complaint goes to the admissibility of the *Brady* material, this contention is irrelevant. *Sellers v. Estelle*, 651 F.2d 1074 (1981) *cert. den.* 102 S.Ct. 1292. The assertion that the information that was given to the New Orleans Police Department was not credible and does not rise to the level of *Brady* material is without merit. This argument is undercut by the fact that after Officer Mckenzie [sic] received the information from Detective Gallardo he found it sufficiently credible to merit his further investigation. More importantly, at the evidentiary hearing Stinson admitted making the statement in reference to Lenore Collins' death ". . . that she was killed the same way Erma Lofton was." Magistrate's Hearing 1/30/84 at 55. Although Stinson attempted to deny that this statement was an admission that he killed Ms. Collins, his former common law wife, this statement could be viewed by a trier of fact as a confession which would by logical necessity exculpate Monroe. *See, Sellers v. Estelle*, 651 F.2d 1074 (5th Cir. 1981); A.B.A. Standards for Criminal Justice 11-21(c). At the least, it is material bearing on the guilt or innocence of petitioner which a State court should be obliged to consider in a request for new trial; material that was heretofore unavailable.

Since there was no allegation that Monroe's attorney made a request for this evidence, the proper standard for determining whether the evidence that was withheld is material is whether it creates a reasonable doubt that did not otherwise exist. *United States v. Agurs*, 427 U.S. 97 (1976); *Canon v. State of Alabama*, 558 F.2d 1211 (5th Cir. 1977). To make this evaluation the Court has carefully examined the trial transcript from Monroe's second trial. *United States v. Anderson*, 574 F.2d 1347 (5th Cir. 1978); *Cannon, supra*. This new evidence creates a reasonable doubt that did not otherwise exist. The Court's reading of the record reveals there was no sign of a forced entry into the Collins

home. This, coupled with the fact that no murder weapon or blood stained clothing or rags were found at or around Monroe's home, indicate that Monroe may not have committed the murder. The record also reveals that Monroe's mother testified that on the day of the murder Stinson came by the Collins home and tried to see his ex-common law wife. After he was told that she was not at home he said that he would come back that evening. This evidence makes the assertion that Stinson committed the murder plausible.

The only evidence that directly linked Monroe to the murder was the eyewitness testimony of the victim's two children. Although this testimony would seem to clearly establish Monroe's guilt, the Court is disturbed by many aspects of their testimony. First, the Court believes that it is most curious that Joseph Collins ran into the Monroe household to seek assistance when Monroe was, allegedly, in the process of murdering his mother. Second, Detective Gallardo's testimony, at the evidentiary concerning the facts surrounding the allegation that Stinson intimidated witnesses in Michigan as well as the Bridges testimony concerning the possibility that the children may have been coerced, supports the Court's concern that the children's testimony should be weighed against the exculpatory evidence by a State court.[1]/ This is not to say that a trier of fact might not conclude that the children's testimony is credible. The Court expresses no opinion on this matter. The Court is, however, faced with the task of evaluating the record to determine the possible effect that the evidence that was withheld might have upon a trier of fact.

In light of the Court's careful evaluation of the record, the fact that Stinson made a statement that could be reasonably construed as a confession leads this Court to find that this evidence creates a reasonable doubt as to Monroe's guilt that did not previously exist. The Court was, therefore, obliged to issue the Writ of Habeas Corpus on the ground

---

1/ For reasons best known to respondents, the Collins children were not called to testify at the evidentiary hearing before the Magistrate.

that Monroe's due process *Brady* rights were violated. *Austin v. McKaskle*, No. 82-1418 slip op. (5th Cir. Feb. 3, 1984).

In reviewing the record from Monroe's post conviction motion before the Criminal District Court for the Parish of Orleans the Court finds, contrary to respondent's assertion, that the trial court denied Monroe the opportunity to effectively raise the claim that his *Brady* rights were violated. Respondent admits at this hearing that Monroe was unable to present the exhibits to the trial court which were produced at the evidentiary hearing held by the United States Magistrate. Monroe was also unable to introduce in the trial court the testimony elicited at the evidentiary hearing.

Since the evidence came into the possession of the authorities in New Orleans after Monroe's conviction but before the expiration of the time that a motion for a new trial based on newly discovered evidence could have been filed, this Court finds that the taint caused by the State's violation of Monroe's *Brady* rights unconstitutionally impaired his right to file a motion for a new trial or obtain post conviction relief. Since the Court is obliged to fashion a remedy that disposes of the claim so as to do what justice and the law require, 28 U.S.C. 2245, the Court is empowered to fashion a remedy that redresses the deprivation Monroe actually suffered. Thus, the Court entered an order which requires the State to provide to Monroe whatever he was entitled to by way of post-conviction relief during the limitation period provided by Louisiana law for a request for a new trial based on newly discovered evidence *c.f. Dowd v. United States*, 340 U.S. 206 (1955).

This Court expresses no opinion regarding the guilt or innocence of Monroe. Our obligation is to decide whether any aspect of the State court criminal proceeding was constitutionally defective, if the State court fails to do so. That issue has now been decided. The period during which Monroe could request a new trial was tainted with constitutional infirmity because material exculpatory matter bearing on Monroe's guilt or innocence was suppressed.

It is now the obligation and duty of the State court to grant Monroe post-conviction relief rights that comport with his constitutional rights.

New Orleans, Louisiana, this 28th day of February, 1984.

/s/ MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONALD S. MONROE	*	CIVIL ACTION
VERSUS	*	NO. 83-6277
ROSS MAGGIO, WARDEN, LOUISIANA STATE PENITENTIARY, ANGOLA	*	SECTION "F"(5)

ORDER

The Court having reviewed the Findings and Conclusions of Magistrate Livaudais, the transcript of hearing held on January 30, 1984 and the exhibits received, and after considering Respondent's Objection to Magistrate's Findings and Conclusions, accepts the Magistrate's Findings and Conclusions and finds that Petitioner's due process rights during the post-conviction relief period following his trial were unconstitutionally deprived because material exculpatory matter bearing directly on his guilt or innocence was suppressed by the local prosecuting authority after his conviction in violation of the United States Supreme Court decision in *Brady v. Maryland*, 373 U.S. 83 (1964).

Now that this Court has determined the Federal constitutional question the State courts of Louisiana should find it possible to provide the post-conviction review to which Petitioner is entitled. Therefore,

IT IS ORDERED:

That the Petition of Ronald S. Monroe for a Writ of Habeas Corpus is granted; and

IT IS FURTHER ORDERED:

That Petitioner's date of execution is postponed and the State of Louisiana is directed to grant to Petitioner whatever he was entitled to by way of post-conviction relief during the limitation period provided by Louisiana law for a request for a new trial based upon the exculpatory material which the State courts did not have an opportunity to

consider, so that Petitioner may fully and effectively exercise and exhaust his post-conviction relief rights under Louisiana law.

Written reasons will follow shortly.

New Orleans, Louisiana, this 15th day of February, 1984.

/s/ Martin L.C. Feldman
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONALD S. MONROE	CIVIL ACTION
versus	No. 83-6277
ROSS MAGGIO,	
Warden, ET AL	SECTION: F/5

FINDINGS AND CONCLCUSIONS [sic]

Petitioner, Ronald S. Monroe, is a state prisoner presently incarcerated in the Louisiana State Penitentiary at Angola, Louisiana. He was convicted of first degree murder of Lenora Collins on January 26, 1978 and on that same date the jury recommended the death sentence. The Supreme Court of Louisiana reversed the conviction and sentence on December 15, 1978. *State v. Monroe*, 366 So.2d 1345 (La. 1978). On January 23, 1980 petitioner was retried on the same charge, convicted, and again the jury recommended the death penalty. The court sentenced petitioner on February 6, 1980 to death by electrocution. The Louisiana Supreme Court affirmed the conviction and sentence on April 6, 1981. *State v. Monroe*, 397 So.2d 1258 (La. 1981), *rehearing denied.*

Petitioner's execution was scheduled for January 5, 1984 at 12:01 a.m. He applied to this Court for a writ of habeas corpus and for post-conviction relief pursuant to 28 U.S.C. § 2254 on December 30, 1983. Previously, petitioner sought post-conviction relief, a new trial and a stay of execution in the Criminal District Court, Parish of Orleans. On December 29, 1983 the request for the stay was denied. The request for a new trial, for a continuance on motion for a new trial, and

for a stay of execution was denied on January 3, 1984 by the Criminal District Court in Orleans Parish. This Court denied petitioner's application for a stay of execution on January 3, 1984. The Louisiana Supreme Court denied petitioner's application for post-conviction relief and for a stay of execution on January 3, 1984. The Louisiana Supreme Court denied petitioner's application for post-conviction relief and for a stay of execution on January 3, 1984. *Monroe v. Maggio*, ___ So.2d ___, No. 83-KP-2651 (La. January 3, 1984). Thus, petitioner has exhausted his state remedies. *Minor v. Lucas*, 697 F.2d 697 (5th Cir. 1983); *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198 (1982).

The matter was heard on January 4, 1984 and this court considered several grounds alleged by petitioner in support of his application for a stay and for post-conviction relief. The Court granted the petitioner's stay until February 7, 1984 on the basis of ground two of petitioner's application to permit an evidentiary hearing to review the validity of petitioner's claim of a denial of due process. The Court specifically found that all other grounds of petitioner's application lacked merit. (Record Document 12 at 14).

An evidentiary hearing was held on January 30, 1984 to consider the merits of the second ground alleged in this petition for habeas corpus. (Record Document 1 at 7). Ground two raises the issue of whether petitioner's Sixth Amendment rights were violated by the State's suppression of evidence which was allegedly exculpatory in nature and which could have indicated that petitioner is not guilty of the crime for which he was convicted and sentenced to death. The petitioner argues that he was denied due process of law under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1964) because the

State failed to relay to defense counsel the fact that a Michigan police detective informed the New Orleans Police Department of the possible confession of another man to the crime for which petitioner has been convicted.

The prosecution's suppression of evidence when it has been requested by the accused, if the evidence is favorable to him and is material to his guilt or his punishment, violates due process whether or not the prosecution is in good faith or bad faith. *Brady*, 83 S.Ct. at 1196–1197. If the defendant makes a general request for all exculpatory evidence or makes no request at all for evidence, the prosecutor violates his constitutional duty to disclose if "his omission is of sufficient significance to result in the denial of defendant's right to a fair trial." *United States v. Agurs*, 427 U.S. 97, 108, 96 S.Ct. 2392, 2400 (1976).

The prosecution is not required to supply the defense with "a complete and detailed accounting ... of all police investigatory work on a case." *Moore v. Illinois*, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568 (1972). Undisclosed evidence is not material if it is only possible that it might have helped the defense or affected the outcome of the trial. *Agurs*, 96 S.Ct. at 2400. Omitted evidence is material and its suppression violates due process if it creates a reasonable doubt that did not otherwise exist when it is considered in light of the entire record. *Id.* at 2402. If reasonable doubt about defendant's guilt does not exist with or without evaluation of the ommitted [sic] evidence, a new trial should not be granted. However, if the additional evidence, even if it is of relatively minor importance, creates a reasonable doubt, the evidence is material and the prosecution's suppression of it amounts to constitutional error. *Id.*; *Sellers v. Estelle*, 651 F.2d 1074 (5th Cir. 1981).

Further, the fact that the prosecuting attorney is not shown to have knowledge of the exculpatory evidence does not neutralize the nondisclosure. "Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld." The police department is part of the prosecution; the state has the duty to disclose and the fact that the police had not informed the prosecuting attorney does not excuse the nondisclosure of material exculpatory evidence under *Brady. Barbee v. Warden Maryland Penitentiary,* 331 F.2d 842, 846 (5th Cir. 1964).

The State must prove the defendant's guilt beyond a reasonable doubt in order to convict him. *Jackson v. Virginia,* 443 U.S. 307, 309 (1979). In order to determine if the "omitted evidence creates a reasonable doubt that did not otherwise exist," the court must "evaluate all the evidence as it would bear on the deliberations of a factfinder." *Cannon v. State of Alabama,* 558 F.2d 1211, 1213–1214 (5th Cir. 1977). *See Agurs,* 427 U.S. 112, 96 S.Ct. at 2401.

As aforesaid, petitioner was convicted in January, 1980. In Louisiana a motion for a new trial based on discovery of new and material evidence may be filed within one year after verdict. LSA–C.Cr.P. Art. 851(3), 853. Evidence adduced at the hearing before the undersigned established that in July, 1980, Detective Joseph W. Gallardo of the Pontiac, Michigan Police Department contacted the New Orleans Police Department and told them that in the course of investigating one George Stinson's murder of his common-law wife in Michigan, he had received information that Stinson may have also murdered his previous wife, Lenora Collins, three years earlier in New Orleans. On September 23, 1980, he again tele-

phoned the New Orleans Police Department and spoke to Sergeant John McKenzie, platoon commander of the homicide division of the New Orleans Police Department. Gallardo told McKenzie of a tape recorded interview (Plaintiff Exhibit 2) he had had with Francis Lee McWilliams,[1]/ Stinson's cellmate in the Oakland County Jail, where Stinson had been incarcerated after his arrest for Lofton's murder.

During the interview, McWilliams related several conversations he had had with Stinson, during which Stinson first confessed to stabbing Lofton, and then stated that "the same thing happened" to his first wife -- Leonora Collins. Detective Gallardo also reported information he had received that Stinson had threatened Collins' two children -- Joseph and Theodise[2]/ -- into identifying Monroe as their mother's killer.

Sergeant McKenzie scribbled notes of his conversation with Gallardo, and then after verifying the existence of a New Orleans case file wrote a three page summary in more legible and chronological order. (Defendant Exhibit 1, testimony of McKenzie, at 12, 13). Petitioner contends that this three page summary made on September 23, 1980 (Plaintiff Exhibit 5) constituted *Brady* material which was not made available to him until produced earlier in these proceedings. Sergeant McKenzie explained that the top and center portions of page one of the summary was information he gleaned from the New Orleans case file, the bottom portion of page one and all

---

1/ McWilliams had been transported to New Orleans to testify at the hearing but was not called by either party.

2/ The eyewitnesses then aged fourteen and thirteen respectively who testified at the New Orleans trial.

of page two was information given him by Detective Gallardo and that page three constituted notes of his follow up after the telephone call. (Defendant Exhibit 1 at 18). He placed the information in the pigeonhole mailbox of the detectives in charge of the case. (Defendant Exhibit 1 at 52–53). The detectives did not recall receiving the information. The summary was located in the case file and produced by counsel for respondent upon discovery request in this habeas proceeding. This was petitioner's first access to it.

This summary states in pertinent part:

> "While in jail Stinson got to bragging about how he had murdered wife in Michigan to cellmate.
>
> Stinson also bragged that he had killed his first wife in New Orleans on 9–10–77 and threatened his step-children into identifying neighbor as killer.
>
> . . .
>
> Det. Gallardo also got information from a second source that Stinson had killed New Orleans wife *Collins*." (Plaintiff Exhibit 5 at 2).

It is undisputed that State authorities suppressed the evidence concerning George Stinson that they received from Detective Gallardo. Respondent has admitted that neither Ronald Monroe, his attorneys, nor anyone acting on Monroe's behalf was ever informed by anyone acting on behalf of the State of any of this information. There was no showing that this non disclosure was willful or malicious. For some unexplained reason the information never got to the attention of the prosecutor. This fact that the District Attorney's office may not have known of the information communicated by Detective

Gallardo to the Police Department is immaterial. The obligation to disclose attaches whenever the police in the prosecuting jurisdiction possess exculpatory evidence. *United States v. Agurs* 427 U.S. 97, 110 (1976); *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Freeman v. Georgia*, 599 F.2d 65, 69 (5th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980).

The second element of proof in establishing a *Brady* violation is that the suppressed evidence is favorable to the defendant. It is hard to imagine evidence more potentially favorable to a defendant than the possibility of another person's confession to the crime for which he has been convicted coupled with a suggestion of a second source of information in support. Stinson's denial that he confessed the New Orleans murder to his cellmate in Michigan does not, of itself, render the evidence unfavorable. His Michigan attorney protected his interests and secured a grant of immunity from prosecution for the New Orleans murder. (Stinson Exhibit 1). Nonetheless, a confession at this time under these circumstances might adversely effect whatever Michigan release from custody rights he enjoys. His Michigan sentence was confinement for a minimum term of ten years, a maximum of twenty-five. (Plaintiff Exhibit 8).

The final element, materiality of the suppressed evidence is also established. The suppressed material (Plaintiff Exhibit 5) enhanced by the evidence adduced at the hearing sufficiently creates a reasonable doubt that did not otherwise exist. A parallelism between the Michigan and New Orleans murders was shown. In each Stinson was the husband, in each a possible motive may have been the wife's apparent disaffection, in each a stabbing and in each a suggestion of witness intimidation. The State trial judge did not have the advantage

of having this evidence produced to him some seven months after trial when it surfaced. Some three years after trial a different State judge heard petitioner's post-conviction claims, but even then did not have the text of the suppressed evidence (Plaintiff Exhibit 5), rather only a suggestion concerning the Michigan information. A reasonable doubt has been shown to now exist, when had not formerly, evaluated in the context of the entire record.

Petitioner has satisfied *Brady - Argus* [sic] criteria. His ground two of this petition for a writ of habeas corpus is meritorious. It is, accordingly, RECOMMENDED that a writ of habeas corpus be GRANTED and that the Court issue whatever order(s) be deemed appropriate.

New Orleans, Louisiana, February 2, 1984.

/s/ MARCEL LIVAUDAIS, JR.
United States Magistrate

NO. 88-1154

Supreme Court, U.S.
FILED
MAY 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RONALD S. MONROE

Petitioner

Versus

HILTON BUTLER,
WARDEN, LOUISIANA STATE PENETENTIARY
ANGOLA, LOUISIANA

Respondent

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS STATE OF LOUISIANA

HARRY F. CONNICK
DISTRICT ATTORNEY
OF ORLEANS PARISH

BRIAN T. TREACY
ASSISTANT DISTRICT ATTORNEY
OF ORLEANS PARISH

619 South White Street
New Orleans, Louisiana 70119
TELE: (504) 822-2414

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Reasons for Denying Certiorari 1

Statement of the Case 2

Statement of the Facts 3

Argument 3

Conclusion 14

Certificate of Service 15

Appendix A 1A

TABLE OF AUTHORITIES

Pages

Cases

Armstead v. Maggio, 770 F.2d 894 (5th Cir. 1983) 4

Booth v. Maryland, 479 U.S. 882, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) 1, 2, 5 6, 7, 13, 14

Byrne v. Butler, 845 F.2d 501 (5th Cir. 1988) 7

Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) 1, 2, 8 9, 13, 14

Darden v. Wainwright, 477 U.S. 168, 183-84 n. 15, 106 S.Ct. 2464, 2473 n. 15 91 L.Ed.2d 144, 159 n. 15 ..... 8, 9

Desist v. United States, 394 U.S. 244, 256-57, 89 S.Ct. 1030, 1037-38, 22 L.Ed.2d 248 (1969) 13

Link v. Walker, 381 U.S. 618, 636, 85 S.Ct. 1731, 1741, 14 L.Ed.2d 601 (1965) 13

Mills v. Maryland, _____ U.S. _____ , 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) 2, 9, 10 12, 13, 14

Monroe v. Blackburn, 476 U.S. 1145, 106 S.Ct. 2261, 90 L.Ed.2d 706 (1985) 3

Monroe v. Butler, _____ U.S. _____ , 108 S.Ct. 1582, 99 L.Ed. 897 (1988) 3

TABLE OF AUTHORITIES (Continued)

Pages

Cases

Monroe v. Butler, _____ U.S. _____ , 109 S.Ct. 7, 101 L.Ed. 958 (1988) 3

Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988) 8

Penry v. Lynaugh, 108 S.Ct. 1896 (1988) 1, 2, 4, 5

Sawyer v. Butler, 848 F.2d 582, (5th Cir. 1988) 8

State v. Monroe, 397 So.2d 1258 13

Teague v. Lane, 109 S.Ct. 1060 (1989) 2, 13

Townsend v. Sane, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963) 4

Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986) 9

Statutes, Rules and Constitutional Provisions

La. C. Cr. P., Art. 851 4

La. C. Cr. P., Art. 905.9 8

REASONS FOR DENYING CERTIORARI

I. In a myriad of unsubstantiated assertions about there being "new pieces of evidence," petitioner, once again, for at least the *third* time, asks this Court to grant a Motion for New Trial where the state courts refuse to grant one. This Honorable Court's decisions make it clear that federal courts *are not* proper forums to decide New Trial Motions Based on Newly Discovered Evidence.

II. No competent evidence exists to show Monroe's level of intelligence, *or* lack thereof. Even accepting petitioner's unfounded allegation that he is a "borderline mental retard," this classification does not qualify him as a ***Penry*** type defendant, (***Penry v. Lynaugh***, citation below).

III. Absolutely no meaningful comparison can be made between the VIS evidence used in ***Booth v. Maryland***, (citation below) and the trial references to the victim's family in the instant case.

IV. Monroe's jury was repeatedly informed of its full responsibility in imposing the death penalty. The jury was repeatedly informed that *their* final decision would determine whether a life or death sentence would be imposed. The rule of ***Caldwell v. Mississippi***, (citation below) has no application here.

V. Monroe's jury was clearly, unequivocally and specifically told that their failure to unanimously agree on a death sentence would result in a life imprisonment term. Thus, there was absolutely no risk that the jury was misinformed or led to believe that they must

unanimously find a mitigating circumstance before a life sentence could be imposed. The rule of ***Mills v. Maryland***, (citation below) is similarly inapplicable here.

VI. The rule of ***Teague v. Lane***, (citation below) prohibits Monroe from raising the ***Penry***, ***Booth***, ***Caldwell*** and ***Mills*** claims in this petition for collateral review.

STATEMENT OF THE CASE

Proceedings Below Since Monroe's Last Appearance In This Court

After petitioner's application for writ of certiorari in this court was denied, a third execution date was set for August 25, 1988.

In concert with petitioner's strategy of delay, exaggeration, and obfuscation a thirty-three (33) page brief containing five new constitutional claims was filed in state trial court *three* days (August 22, 1988) before the scheduled execution. The petition was denied in the trial court. However, the Louisiana Supreme Court stayed the execution for the purpose of giving closer scrutiny to the "identification issue." On November 14, 1988 the stay was lifted (*See* "Order," Pet. Br., Appendix "B".) In a concurring opinion, Justice Lemmon reaffirmed the soundness of the conviction by describing the two eyewitness identifications of Monroe as being "rock solid."

Once the stay was lifted, a fourth warrant of execution was duly issued for December 14, 1988. After the November 14th order lifting the stay, petitioner failed *another* motion for stay. In stating grounds for a stay, petitioner misled the state court into believing that (1) the same ***Brady*** issue raised in petitioner's last appearance had not yet been before

this court, and, (2) time was needed to prepare a petition to this Court when, in fact, one had been prepared, filed, and served on respondent. The court granted *another* stay for the purpose of allowing this Court to review the identification issue.[1]

STATEMENT OF THE FACTS

In the early morning of September 10, 1977 Ronald Monroe entered the home of Lenora Collins and mercilessly slaughtered her in the presence of her two children, Theodise and Joseph. Monroe, a next door neighbor, also stabbed one of the children who tried to thwart the attack. Within minutes police arrived. The surviving children immediately pointed out Monroe as the murderer. No other competent evidence exists to controvert these established facts. Based on these "rock-solid" and unimpeachable identifications, Monroe was convicted and sentenced to death.

ARGUMENT

I. The Motion for a New Trial

Monroe's tiring, incessant claim that another person is responsible for this crime has been before this court on at least three prior occasions.[2] It has been exhaustively reviewed and examined by every court of appellate access. This

---

1. The state sought reconsideration of the stay order by reminding the court that Petitioner did raise the issue in this court previously and filed a brief in this Court. The state's Motion to Reconsider was denied by a 5-3 margin. (See Exhibit "A").

2. *Monroe v. Butler*, _____ U.S. _____, 109 S.Ct. 7, 101 L.Ed. 958 (1988); *Monore v. Butler*, _____ U.S. _____, 108 S.Ct. 1582, 99 L. Ed. 897 (1988); *Monroe v. Blackburn*, 476 U.S. 1145, 106 S.Ct. 2261, 90 L.Ed.2d. 706 (1985).

matter is now *res judicata*. Respondent respectfully refuses, once again, to engage in more verbal jousting on an issue that has been repeatedly reviewed and decided in a manner Monroe simply will not accept, but must. When stripped to its essentials it is simply another disguised plea for a new trial due to alleged newly discovered evidence.

This case comes to the Court on a writ of certiorari to review the Louisiana Supreme Court's denial of a state post-conviction relief application. Louisiana's standard of appellate review for the denial of new trial motions is set forth in La. C. Cr. P. Art. 851. Petitioner takes issue with this standard and claims a different one should apply in capital cases. However, petitioner cannot show this Court how the standard is unconstitutional, or, how it was unconstitutionally applied in the courts below. This Court has long held that the proper forum for determining the merits of new trial motions based on newly discovered evidence for a state conviction is in *state* court, *not federal court*. ***Townsend v. Sain***, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), See e.g., ***Armstead v. Maggio***, 770 F.2d 894 (5th Cir. 1983). Petitioner presents no compelling reasons to amend this longstanding procedure.

II. The *Penry* Claim

Nearly twelve years after Monroe killed Lenora Collins, and one week before his August 25, 1988 execution date, it was suddenly discovered that Monroe is a "borderline retard." Monroe urges this Court to equate his case with the ***Penry v. Lynaugh***, 108 S.Ct. 1896 (1988), case currently pending the decision of the Court on whether it is constitutional to execute a mentally retarded person. Monroe claims he too should be declared ineligible for capital punishment.

Monroe's own classification distinguishes himself from the ***Penry*** defendant. The most Monore can claim about his mental condition is that he is a "borderline retard" (Pet. Br. p. 18). What distinguishes borderline retardation from chronic retardation is not made clear. What is clear is that nowhere in ***Penry's*** case is the qualifier "borderline" used. Additionally, in ***Penry***, the question of retardation arose in a contradictory courtroom setting where witnesses were subjected to the rigors of cross-examination and the adversarial process. Just like the "new pieces of evidence" discussed above, this evidence is presented to this Court in the most unreliable form of rank hearsay available. At no time has Monroe tried to admit competent evidence in a trial court to support his claim. Unlike ***Penry***, no evidence of alleged borderline mental retardation was offered during any pre-trial or post-trial hearings; no insanity defense was ever raised. Monroe's mental capacity has never before been an issue in this case until after this court granted ***Penry's*** writ application.

Respondent submits that even if Monroe could prove he is a "borderline retard," his particular condition does not qualify him for consideration; particularly when the evidence submitted to support this classification is incompetent, and, particularly when the most that the submitted evidence shows is that the petitioner has difficulty "sorting through the more complex social demands of living without external support," (See Pet's. Br. p. 18.) Not a soul on earth can claim that he/she does not have the same difficulty on any given day of the week.

III. The *Booth* Claim

Monroe complains that several references during trial concerning the impact of the crime on family members violated the rule set down in ***Booth v. Maryland***, 479 U.S. 882, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987).

In ***Booth***, this Court held that a Maryland statute requiring the introduction of a "Victim Impact Statement" ("VIS") at the sentencing phase of a capital murder trial violated the eighth amendment. The information in the VIS at issue in ***Booth***, which could either be read to the jury or testified to by family members, described in pronounced detail the personal characteristics of the victims, the emotional impact of the crime on the family, and the family members' opinions and characterizations of the crime and the defendant. After analyzing the many dangers inherent in allowing such information before the jury, this Court "reject[ed] the contention that the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics, are proper sentencing considerations in a capital case." ***Booth***, 107 S.Ct. at 2535.

The Court was careful to stress that its disapproval of victim impact information at the sentencing phase of a capital trial does not mean that information about the impact of the crime on the family and victim's personal characteristics will never be relevant in any context. ***Booth***, 107 S.Ct. at 2535 N.10. "Similar types of information may well be admissible because they relate directly to the circumstances of the crime," Id.

Petitioner complains that the trial testimony *and* the prosecutor's closing argument in the sentencing phase was "precisely the same type" forbidden by ***Booth***.

Review of the trial record exposes another example of petitioner's prowess at gross exaggeration. The cited passages of so-called inflammatory trial testimony indicate oblique, brief and cryptic references to the victim's family. Even a cursory comparison of the VIS permitted before the jury in ***Booth*** and the references to the Collins family in the instant case reveal a wealth of difference in the scope, tone and effect of the information provided in ***Booth***.

Booth footnote ten (10) is particularly revealing in the instant case. Note that *all* of the victim's immediate family were *fact* witnesses for the state during trial. The victim's children eyewitnessed the murder. The victim's mother established the motive. The victim's sister originally called the police. All of the complained of trial testimony related to circumstances of the case.[3]

During the state's closing argument in the sentencing phase, Monroe's trial counsel presented three witnesses; a social worker, a priest, and a sociology professor. All three witnesses admitted their prejudice against the imposition of the death penalty in any case. Their entire testimony was a blatant attempt to obtain sympathy for Monroe's underprivileged condition. In response, the state reminded the jury that for all they had just heard about Ronald Monroe's deprived background, *no evidence* was heard about the Collins' family and the impact of the event on the victim's children who eyewitnessed this murder.[4]

One need only peruse the VIS appended to the ***Booth*** decision to appreciate the qualitative difference in both length and detail of the evidence presented in that case and its impact upon a jury. The same risk of inflaming the jury and diverting it from its responsibility simply did not exist in this case.

---

3. For example, in *Byrne v. Butler*, 845 F.2d 501 (5th Cir. 1988) the Fifth Circuit recognized that not all incidental references to victim's family's reaction to the crime is *Booth* material, particularly when references are elicited by fact witnesses.

4. It is interesting to note that even Monroe's trial counsel thought that the jury should not overlook the impact of the murder on the Collins family, ". . . and I am not trying to say that the family of the victim has not suffered or in any way say that should be overlooked," (Tr.T. 252).

IV. The *Caldwell* Claim

Petitioner also maintains that in closing argument at the punishment stage the prosecutor violated the rule of ***Caldwell v. Mississippi***, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

In ***Caldwell***, this court speaking through Justice Marshall, whose consistent view has long been that capital punishment is forbidden by the Constitution in any case, declared a death sentence unenforceable because it was imposed by a jury that had been misled by the judge *and* prosecutor about its role in the sentencing procedure. Concluding that the prosecutor's comments rendered the sentencing proceeding fundamentally unfair, a divided court required resentencing.

The misleading comment made by the prosecutor to the jury in ***Caldwell*** was, "Your decision is not the final decision." In the instant case the prosecutor merely stated the rule of Louisiana law requiring the Supreme Court to review all death penalty cases.

Caldwell has been interpreted to be a rule of narrow application. Only comments misleading a jury as to its role in the capital sentencing process by inducing it to feel less responsible than it should for the sentencing decision are prohibited. ***Darden v. Wainwright***, 477 U.S. 168, 183-84 n. 15, 106 S.Ct. 2464, 2473 n. 15, 91 L.Ed.2d 144, 159 n. 15). See also, ***Parks v. Brown***, 860 F.2d 1545 (10th Cir. 1988), and, ***Sawyer v. Butler***, (848 F.2d 582, 5th Cir. 1988). The prosecution in this case merely stated to the jury that the Supreme Court reviews each death penalty case. This was a correct statement of the law, (See, La.C.Cr.P., Art. 905.9), just as defense counsel's statement concerning the availability of pardons from the Governor was a correct statement of law (Tr.T. 250). Nowhere did the prosecution

suggest in any manner whatsoever that the jury's decision was not the final decision, Cf. ***Wheat v. Thigpen***, 793 F.2d 621 (5th Cir. 1986) (death penalty vacated for prosecutor telling jury that their decision is not final). Nor did the prosecutor *mislead* the jury about its role in the sentencing procedure. In fact, the jury had been told at several trial junctures that execution could not be exacted without *their* permission, (Tr.T. 249, 252, 258).

Caldwell is inapplicable here because, as in ***Darden***, neither the prosecution nor the judge mislead the jury or misstated the law; nor did they mislead the jury into thinking it had a reduced role in the sentencing process.

V. The *Mill's* Claim

Monroe next complains that the trial court erred in instructing the jury that it must unanimously find mitigating circumstances before it might weigh them against aggravating circumstances in violation of this Court's recent rule set down in ***Mills v. Maryland***, _____ U.S. _____, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). The result of such an instruction, Monroe alleges, is that the sentencing phase of the trial became subject to the possibility of a completely arbitrary decision to impose death because one juror could prevent all other jurors from considering a particular mitigating circumstance.

In ***Mills***, this Court considered the propriety of a verdict form submitted to a jury in a Maryland state court and concluded that, "there is a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance."

Mills, 108 S.Ct. at 1870. In vacating the judgment which sustained the imposition of the death penalty, the court focused on the specific written instructions given in that particular case and the verdict forms given to the jury. The court stated that the critical question was whether a reasonable jury (or reasonable juror) could have understood the instructions to mean that *all* 12 jurors had to unanimously find a mitigating circumstance before it could be considered.

In brief, petitioner selectively presents to this Court only a portion of what the jury was instructed. When the entire picture is framed, however, this claim is clearly exposed for its meritlessness. Note the following instructions given to Monroe's jury which were conveniently omitted from petitioner's brief:

> BY THE JUDGE:
>
> (After the sentencing hearing, but before deliberations)
>
> "Before you decide the sentence of death should be imposed you must unanimously agree (sic) find beyond a reasonable doubt that at least one statutory aggravating circumstance exists. If you find beyond a reasonable doubt that any of the statutory aggravating circumstances existed, you may consider it in imposing a sentence of death. **If, however, you do not unanimously find beyond a reasonable doubt that any one of the statutory aggravating circumstances existed, then, life imprisonment without benefit of probation, parole or suspension of sentence is the only sentence which may be imposed.** Even

if you find the existence of an aggravating circumstance, you must also consider any mitigating circumstances before you decide that a sentence of death should be imposed. The law specifically provides certain mitigating circumstances. These are as follows:" Tr.T. 258-59.

(The court recites statutory mitigating circumstances,) Tr.Tr. 260.

"I am going to ask the clerk to hand to the jury two blanks forms of verdicts . . . No listing of aggravating or mitigating circumstances is required." T.Tr. 261-62.

(The jury is ordered to deliberate shortly thereafter.)

Of crucial importance in this case is what transpired when the jury returned for more instructions.

BACK IN OPEN COURT:

BY THE COURT:

Who's the Foreman?

(The Court asks the foreman what further instructions might be helpful and a motion to declare a hung jury is denied.)

BY THE FOREMAN:

We are divided right now in our decision making. From the

evidence of discussion upstairs, I don't believe from the discussion we had that we are going to be able to get off dead center, because each one of us feel strongly about our particular posture right now. With that in mind, I felt like I had to ask you how we should approach the problem.

BY THE COURT:

Well, the law is this. As I understand it, and for present purposes, I am the law. As I understand it to render a verdict of death penalty, the penalty of death, the jury must agree unanimously. **However, if the jury cannot agree, then the court must impose a sentence of life imprisonment without the benefit of probation, parole or suspension of sentence. Is that clear to all of of you?**
(Jurors respond affirmatively.)

(The court then informs the jury that they should return to deliberate a while longer.)

Note the several clear and distinct instructions given to Monroe's jury contrasted to those given in ***Mills***.

Monroe's jury was told that failure to unanimously agree on finding aggravating or mitigating circumstances would result in life imprisonment; i.e., a hung jury equals life imprisonment. All of the jurors were expressly informed in plain and simple language that if even one juror believed that the death penalty should not be imposed, Ronald Monroe would not be sentenced to death.

Thus, there was nothing arbitrary in the jury's verdict.

VI. *Teague* Precludes Review of Three Claims

Respondent respectfully represents that this Court's recent decision in ***Teague v. Lane***, 109 S.Ct. 1060, (1989), precludes review of petitioner's ***Mills***, ***Booth***, and ***Caldwell*** claims.

In a detailed, extensive analysis of the historical development of retroactivity decisions, this Court ultimately decided to reject the rule of ***Linkletter v. Walker***, 381 U.S. 618, 636, 85 S.Ct. 1731, 1741, 14 L.Ed.2d 601 (1965), and adopted an approach favored by former Justice Harlan first discussed in his dissent in ***Desist v. United States***, 394 U.S. 244, 256-57, 89 S.Ct. 1030, 1037-38, 22 L.Ed.2d 248 (1969). The Harlan rule prohibits federal collateral review of state convictions on constitutional rules or criminal procedure which arise after direct review of the state conviction is final except if two very narrow circumstances are present.

Petitioner's direct review in the Louisiana Supreme Court became final May 19, 1981, (***State v. Monroe***, 397 So.2d 1258). Three of the instant claims arose in the decisions of this Court rendered after May 19, 1981. Neither of the two exceptions noted in ***Teague*** are present in this case.

Thus, under this new retroactivity rule petitioner may not avail himself to the new procedural rules of ***Mills***, ***Caldwell*** or ***Booth***.

CONCLUSION

Petitioner presents no compelling reasons why the Court should grant this writ application. The instant petition is Monroe's latest of a long history of successes in delaying his execution by sensationalizing claims unfounded by the record evidence.

This application should be denied.

Respectfully submitted:

Brian T. Treacy per ee

BRIAN T. TREACY

Assistant District Attorney
For the Parish of Orleans
619 S. White Street
New Orleans, Louisiana 70119
(504) 822-2414

CERTIFICATE OF SERVICE

I, BRIAN T. TREACY HEREBY CERTIFY to the Court that copies of this Reply have been duly served upon counsel for petitioner at the address below per first class mail, postage prepaid on May 4th, 1989.

Forty copies have been filed with the United States Supreme Court by U.S. mail, postage prepaid on May 4th, 1989.

Brian T. Treacy per cs

BRIAN T. TREACY

Douglas Morris, Esq.
1285 Avenue of the Americas
New York, New York 10019

APPENDIX

APPENDIX A

THE SUPREME COURT
OF THE STATE OF LOUISIANA

NO. 88-KD-2654

STATE EX REL RONALD MONROE

VS.

HILTON BUTLER, WARDEN

In Re: State of Louisiana applying for Reconsideration of granting of Stay of Execution from Criminal District Court Parish of Orleans Div. F. No. 261-647.

December 13, 1988

Denied.

JAD
PFC
JLD
HTL

MARCUS, WATSON & COLE, JJ., would grant the writ.

Supreme Court of Louisiana
December 13, 1988

s/s Frank J. Johnson, Jr.
Clerk of Court
For the Court

1988 DEC 14 PM 12:21
(stamp)

Supreme Court, U.S.
FILED
MAY 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1154

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

RONALD S. MONROE,

Petitioner,

v.

HILTON BUTLER,
WARDEN, LOUISIANA STATE PENITENTIARY,
ANGOLA, LOUISIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CRIMINAL DISTRICT COURT FOR THE
PARISH OF ORLEANS, LOUISIANA

PETITIONER'S REPLY BRIEF

ALLAN BLUMSTEIN
(Counsel of Record)
DOUGLAS G. MORRIS
JONATHAN J. FREEDMAN
DAVID R. HAYES
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

JOHN DIGIULIO
331 St. Ferdinand
Baton Rouge, Louisiana 70802
(504) 383-0078

Attorneys for Petitioner
Ronald S. Monroe

TABLE OF CONTENTS

Table of Authorities ii

Preliminary Statement 1

I. If *Teague* Applies to Capital Cases, Monroe's Claims Fall Within an Exception to the Rule 3

II. If *Teague* Applies to Capital Cases, It Should Apply Prospectively, Not Retroactively 5

III. The *Teague* Rule Should Not Apply to Collateral Challenges to a Death Sentence 5

A. The Eighth Amendment's Prohibition Against Arbitrary Punishment 6

B. The Eighth Amendment's "Evolving Standards of Decency" 6

C. The Balancing of Interests in the Capital Context 7

Conclusion 9

TABLE OF AUTHORITIES

Cases

Blonder–Tongue Laboratories, Inc. v. *University of Illinois Foundation*, 402 U.S. 313 (1971) 3

Booth v. *Maryland*, 482 U.S. 496 (1987) 4, 7

Bullington v. *Missouri*, 451 U.S. 430 (1981) 7

Caldwell v. *Mississippi*, 472 U.S. 320 (1985) 4, 7

California v. *Ramos*, 463 U.S. 992 (1983) 8

Capital Cites Cable, Inc. v. *Crisp*, 467 U.S. 691 (1984) 3

Cuyler v. *Sullivan*, 446 U.S. 335 (1980) 3

Dugger v. *Adams*, 109 S. Ct. 1211 (1989) 4

Federal Trade Comm'n v. *Grolier, Inc.*, 462 U.S. 19 (1953) 2

Fry v. *United States*, 421 U.S. 542 (1979) 3

Furman v. *Georgia*, 408 U.S. 238 (1972) 5, 7

Gardner v. *Florida*, 430 U.S. 349 (1977) 8

Godfrey v. *Georgia*, 446 U.S. 420 (1980) 5

Jenkins v. *Anderson*, 447 U.S. 231 (1980) 2

Johnson v. *Mississippi*, 108 S. Ct. 1981 (1988) 8

Kuhlmann v. *Wilson*, 477 U.S. 436 (1986) 8

Lockett v. *Ohio*, 438 U.S. 586 (1978) 7

Mackey v. *United States*, 401 U.S. 667 (1971) 8

Mills v. *Maryland*, 108 S. Ct. 1860 (1988) 4, 7

Standard Industries v. *Tigrette, Inc.*,
397 U.S. 586 (1970) 3

State v. *Monroe*, 397 So. 2d 1258 (La. 1981) 4

Sure-Tan, Inc. v. *NLRB*, 467 U.S. 883 (1984) 3

Teague v. *Lane*, 109 S. Ct. 1060 (1989) ..... 2, *passim*

Trop v. *Dulles*, 356 U.S. 86 (1958) 7

Vance v. *Terrazas*, 444 U.S. 252 (1980) 3

Woodson v. *North Carolina*, 428 U.S. 280 (1976) 4

Zant v. *Moore*, 109 S. Ct. 1518 (1989) 2

Court Rules

Sup. Ct. R. 22.5 1

No. 88-1154

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

RONALD S. MONROE,

Petitioner,

v.

HILTON BUTLER,
WARDEN, LOUISIANA STATE PENITENTIARY,
ANGOLA, LOUISIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CRIMINAL DISTRICT COURT
FOR THE PARISH OF ORLEANS, LOUISIANA

PETITIONER'S REPLY BRIEF

Preliminary Statement

In conformance with this Court's Rule 22.5, petitioner confines this Reply Brief "to arguments first raised in the brief in opposition . . . ."[1]/ The only new argument raised in the State's brief is that

1/ We do feel compelled to note that the State's accusation that Monroe made his application for post-conviction relief "[i]n concert with [his] strategy of delay, exaggeration, and obfuscation" (State opposition brief at 2) is outrageous and untrue. The Louisiana Supreme Court thought enough of the merits of Monroe's application that it stayed an execution date in late August 1988, two months later denied his application by the narrowest of margins in a four to three vote, and one month later stayed another execution date pending review by this Court. The State's further accusation that "[i]n stating grounds for a stay, petitioner misled the state court" (State opposition brief at 2-3) is equally outrageous and untrue. After the State made this very accusation in a motion to reconsider the stay order, the Louisiana Supreme Court denied the motion. Finally, the State's accusation that Monroe has engaged in a "strategy of delay" is ironic not only (continued)

this Court must deny a writ of certiorari because review of Monroe's claims is now precluded by *Teague* v. *Lane*, 109 S. Ct. 1060 (1989).2/

The State's argument is misplaced. As shown below, *Teague* should not prevent the granting of a writ of certiorari since the claims here fall within *Teague*'s innocence exception and since *Teague* itself should not apply retroactively.3/

Perhaps more importantly, the State ignores the fact that *Teague* leaves open the issue of whether it applies in a death penalty context at

---

(continued)
because Monroe has always scrupulously adhered to all procedural requirements but also because the State is the party which submitted its most recent brief in opposition three months late. Furthermore, the State never informed Monroe's counsel of its discussions with this Court's Chief Deputy Clerk in response to his letter of February 23, 1989, promising an opposition brief by April 1, 1989.

2/ In the "Argument" section of its brief in opposition, the State argues that *Teague* precludes review of Monroe's *Booth*, *Caldwell* and *Mills* claims, while in its "Reasons for Denying Certiorari" section, the State asserts that *Teague* also prohibits Monroe from raising his *Penry* claim. The State does not contend that *Teague* precludes or prohibits Monroe's first claim (that the Eighth Amendment bars the execution of a person when there is substantial newly discovered evidence which creates a reasonable doubt as to his guilt). For the convenience of the Court, the present Reply Brief discusses *Teague* in relation to all five of Monroe's claims.

3/ *Teague* also should not prevent the granting of a writ of certiorari for two other reasons.

First, the State did not raise nonretroactivity as a defense to Monroe's claims below and has therefore waived that defense. *See Federal Trade Comm'n* v. *Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983); *Jenkins* v. *Anderson*, 447 U.S. 231, 234 n.1 (1980). *See also Zant* v. *Moore*, 109 S. Ct. 1518, 1519 (1989) (Blackmun, J., dissenting).

Second, the *Teague* rule seems to represent an interpretation of the federal habeas corpus statute rather than the Constitution. *See Teague* v. *Lane*, 109 S. Ct. 1060, 1079 (1989) (White, J., concurring); *id.* at 1084–94 (Brennan, J., and Marshall, J., dissenting). *See also id.* at 1075 n.2 (plurality opinion). If so, *Teague* has nothing to do with this case since Monroe's present claims do not arise out of a *federal* habeas corpus proceeding but rather out of his application for *state* post-conviction relief. If there is any doubt as to whether *Teague* is limited to federal habeas corpus proceedings or should be extended to state post-conviction relief proceedings, then that issue is worthy of review by this Court. *See* note 4 *infra*.

all: "Because petitioner is not under sentence of death, we need not, and do not, express any views as to how the retroactivity approach we adopt today is to be applied in the capital sentencing context." *Id.* at 1077 n.3. By relying on *Teague*, the State has in fact presented another question worthy of review by this Court: Does the *Teague* rule apply to collateral challenges to a death sentence? If this Court addresses that question,[4]/ its answer should be in the negative.

I. If *Teague* Applies to Capital Cases, Monroe's Claims Fall Within an Exception to the Rule

Even if applicable to capital cases, the *Teague* rule does not prevent this Court from granting a writ of certiorari and considering Monroe's claims on their merits. Monroe's claims fall within *Teague*'s second exception, which permits the retroactive application to a case on collateral review of new rules requiring "the observance of those procedures that . . . are implicit in the concept of ordered liberty," *Teague* v. *Lane*, 109 S. Ct. 1060, 1075 (1989), and "without which the likelihood of an accurate conviction is seriously diminished." *Id.* at 1077.

Monroe's first claim — that the Eighth Amendment cannot countenance the execution of a person where, as here, there is substantial, newly discovered evidence which creates a reasonable doubt as to guilt — is a paradigm of the *Teague* exception for new rules designed to assure "the likelihood of an accurate conviction . . . ." It is hard to

---

4/ While this question was not raised in Monroe's Petition for a Writ of Certiorari, this Court might nonetheless order the parties to address this additional question because of its importance, *see generally Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *Fry* v. *United States*, 421 U.S. 542, 545 n.5 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 319-21 & n.6 (1971), or because the question is "fairly comprised" within the other questions since it is a "predicate to the intelligent resolution" of those questions. *Vance* v. *Terrazas*, 444 U.S. 252, 258-59 n.5 (1980); *Cuyler* v. *Sullivan*, 446 U.S. 335, 342-43 n.6 (1980). This approach might be especially appropriate here since the question arises out of a decision of this Court which was made after Monroe filed his Petition for a Writ of Certiorari and which represents a change of law. *See Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 896 n.7 (1984); *Standard Industries* v. *Tigrette, Inc.*, 397 U.S. 586, 587-88 (1970) (Black, J., dissenting).

imagine a constitutional claim which more squarely meets the standard of "the relevance of the likely accuracy of convictions," *Teague* v. *Lane*, 109 S. Ct. 1060, 1076 (1989), than one, as here, bottomed on petitioner's innocence of the crime for which he is condemned to die. If the right Monroe asserts does indeed exist, then it can only be vindicated in post-conviction proceedings.

If *Teague* does apply to capital cases, this Court must clarify the meaning of the second *Teague* exception in relation to capital sentencing. *See Dugger* v. *Adams*, 109 S. Ct. 1211, 1218 n.6 (1989) ("We do not undertake here to define what it means to be 'actually innocent' of a death sentence.") It would seem that *Teague*'s concern for "the likely accuracy of convictions" finds its logical capital sentencing parallel in a concern for "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

As so applied to capital sentencing, the second *Teague* exception must include Monroe's claims for violations of *Booth* v. *Maryland*, 482 U.S. 496 (1987), *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985), and *Mills* v. *Maryland*, 108 S. Ct. 1860 (1988). Each of these three decisions was designed to ensure that death sentences are reached on the basis of fair and accurate deliberation rather than prejudice. And the violations of these three decisions here — alone or in combination — caused Monroe actual prejudice. Since the jury, as the Louisiana Supreme Court has noted, came close to a deadlock on the penalty, *State* v. *Monroe*, 397 So. 2d 1258, 1271 (La. 1981), these violations might well have tipped the balance between life and death.

In short, both constitutional protection against the execution of an innocent man and the guarantee that a death sentence has not been caused by constitutional violations are exceptions to the general rule of nonretroactivity; both are "implicit in the concept of ordered liberty" and necessary to ensure accurate convictions and sentences.

II. If *Teague* Applies to Capital Cases, It Should Apply Prospectively, Not Retroactively

The *Teague* rule should also not prevent this Court from granting a writ of certiorari since, even if it applies to capital cases *prospectively*, it surely should not apply to them *retroactively*.

A central tenet of Eighth Amendment jurisprudence is the prohibition against "the arbitrary and capricious infliction of the death penalty." *Godfrey* v. *Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion); *Furman* v. *Georgia*, 408 U.S. 238 (1972). A central tenet of *Teague* is the importance of the even-handed treatment of those similarly situated. *Teague* v. *Lane*, 109 S. Ct. 1060, 1077–78 (1989). Both of these tenets, however, would be undermined by changing the rules governing relief for all capital inmates on collateral review as of the date of the *Teague* decision. Doing so would create two arbitrary classes of similarly situated but dissimilarly treated collateral capital inmates. Members of the first class would benefit from new constitutional rules simply because their courts acted more expeditiously and reached their cases before the *Teague* decision while members of the second class would not benefit simply because their courts were busier and reached their cases after the *Teague* decision. Members of the first class would be spared, through no special virtue of their own; members of the second class would be executed, through no special fault of their own.

To avoid arbitrary death sentences and to ensure even-handed treatment, this Court should decline to give Teague retroactive effect so as to bar relief for capitally-sentenced inmates during collateral review.

III. The *Teague* Rule Should Not Apply to Collateral Challenges to a Death Sentence

This Court should hold — if it reaches the issue — that the *Teague* rule does not govern collateral challenges to a death sentence.

A. The Eighth Amendment's Prohibition Against Arbitrary Punishment

Extending the *Teague* rule to capital cases would lead to just the sort of "arbitrary and capricious infliction of the death penalty" which the Eighth Amendment should prevent.

In the capital context, the *Teague* rule would hasten or stop executions on nothing more than the timing of appeals and collateral review. Inmates still on direct appeal would benefit from new constitutional pronouncements while inmates in collateral review proceedings would not. They would be put to death — even if they suffered the *same* constitutional injury, raised the *same* objection and took the *same* steps to preserve the issue. They would be put to death — regardless of the fortuity of the factors leading to the announcement of the new constitutional principle during their collateral review proceedings instead of their direct appeal.

In short, the *Teague* rule, if applied to capital cases, would create a situation in which inmates would be granted relief for constitutional violations or be sent to their deaths based on nothing more than the vagaries of appellate review — a wanton and freakish imposition of the death penalty which the Eighth Amendment forbids.

B. The Eighth Amendment's "Evolving Standards of Decency"

Extending the *Teague* rule to capital cases would also thwart this Court's role both in developing rules for capital sentencing hearings and in reflecting "evolving standards of decency" under the Eighth Amendment.

In applying the *Teague* rule to noncapital cases, this Court reasoned that it is "unlikely that many . . . components of basic due process [namely, 'accuracy-enhancing procedural rules' needed to facilitate 'the likelihood of an accurate conviction'] have yet to emerge." *Teague* v. *Lane*, 109 S. Ct. 1060, 1076, 1077 (1989). This reasoning, however, does not apply to capital cases.

For one thing, the "components of basic due process" are still emerging with regard to capital sentencing hearings. In their present form, such hearings are of recent vintage. Only since the decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972), has this Court begun to define the contours of such hearings and to clarify what fundamental principles of due process are constitutionally required with regard to them. *See, e.g., Mills* v. *Maryland*, 108 S. Ct. 1860 (1988); *Booth* v. *Maryland*, 482 U.S. 496 (1987); *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985); *Bullington* v. *Missouri*, 451 U.S. 430 (1981); *Lockett* v. *Ohio*, 438 U.S. 586 (1978). Thus, "components of basic due process" with regard to capital sentencing hearings must be allowed to emerge in collateral review proceedings as well as on direct appeal.

For another thing, a capital case, such as this one, implicates not only due process but also the Eighth Amendment. While the "components of basic due process" in a noncapital context might now be well-established, Eighth Amendment jurisprudence must be guided by the "evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion, per Warren, C.J.). To ensure that Eighth Amendment standards of decency have the chance to evolve, they too must be allowed to do so in collateral review proceedings as well as on direct appeal.

C. The Balancing of Interests in the Capital Context

In *Teague*, this Court found that society's interests in "the principle of finality which is essential to the operation of our criminal justice system" were weighty enough to tip the balance against the retroactive application of new law on collateral review for ordinary criminal cases. *Teague* v. *Lane*, 109 S. Ct. 1060, 1074 (1989). In capital cases, however, the balance tips in favor of such retroactive application because of the compelling interests of both the capital inmate and society in the constitutional integrity of the judgment.

Society, as well as the capital inmate, has a unique and continuing interest in the ultimate reliability of a capital sentence. As this Court has stated: "[T]he qualitative difference of death from all other

punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California* v. *Ramos*, 463 U.S. 992, 998–99 (1983). As this Court has also stated: "It is of vital importance *to the defendant and to the community* that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner* v. *Florida*, 430 U.S. 349, 358 (1977) (plurality opinion) (emphasis added). The retroactive application of new law on collateral review furthers the interest in capital sentencing reliability, promoting for death sentences the "greater degree of scrutiny" and "decision[s] . . . based on reason" which do the inmate justice and society credit.

Thus, this Court has recently required a state to vacate a death sentence where later proceedings showed that one of the predicates for that sentence was unconstitutionally unreliable. *Johnson* v. *Mississippi*, 108 S. Ct. 1981 (1988). That is precisely what happened here. In later proceedings, the federal courts found a reasonable doubt that did not otherwise exist (App. D at 4).

Moreover, society's interests in finality are less in a capital than in a noncapital case. In noncapital cases, finality spares the State the risks of a retrial, prevents the inmate from escaping punishment and promotes rehabilitation. *See Kuhlmann* v. *Wilson*, 477 U.S. 436, 452–53 (1986) (plurality opinion); *Mackey* v. *United States*, 401 U.S. 667, 690 (1971) (Harlan, J., concurring in part and dissenting in part). In a capital case like this one, however, the State is subjected to no prejudice by a retrial, since all prosecution evidence from the original trial is still available; the inmate has not, and will not, escape punishment, but only death, which is especially appropriate if he is indeed innocent; and rehabilitation is promoted by avoiding the death sentence, especially with a model prisoner like Monroe, while rehabilitation is rendered meaningless by an actual execution.

Finally, in the present case, pronouncing a new rule of constitutional law or applying a previous new rule, would not undermine the finality of other death sentences. The circumstances of the present case are extraordinary, and there are few, if any, similarly situated capital inmates.

Conclusion

For the foregoing reasons and for all the reasons stated in the Petition for a Writ of Certiorari, the Petition for a Writ of Certiorari should be granted.

Dated: May 16, 1989

Respectfully submitted,

Allan Blumstein
(Counsel of Record)

Douglas G. Morris
Jonathan J. Freedman
David R. Hayes
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019–6064
(212) 373–3000

– and –

John DiGiulio
331 St. Ferdinand
Baton Rouge, Louisiana 70802
(504) 383–0078

Attorneys for Petitioner
Ronald S. Monroe